TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER,

—*vs.*—

NATIONAL LABOR RELATIONS BOARD, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 1, 1960

CERTIORARI GRANTED OCTOBER 10, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER,

—vs.—

NATIONAL LABOR RELATIONS BOARD, et al.

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the District of Columbia Circuit		
Joint appendix consisting of portions of record before the National Labor Relations Board	A	A
Decision and order, February 6, 1959	7	1
Separate opinion of Member John H. Fanning, concurring in part and dissenting in part	22	13
Appendix A—Notice to all employees pursuant to a decision and order	29	16
Appendix B—Notice to all members of International Ladies' Garment Workers Union, et al.	31	18
Intermediate report, dated July 29, 1958	33	19
Transcript of proceedings	49	31
Appearances	50	32
Motion of respondent Union to dismiss complaint	51	32
Motions of counsel on behalf of NLRB to amend complaint	53	33
Testimony of Richard A. Simon—		
direct	63	37
cross	94	50
redirect	102	54
recross	103	54

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 6, 1961

	Original	Print
Joint appendix consisting of portions of record before the National Labor Relations Board—Continued		
Transcript of proceedings—Continued		
Testimony of Thomas Kovalski—		
direct	105	55
redirect	108	56
Colloquy between Trial Examiner and counsel	110	57
Testimony of Mariano Zuniga—direct	120	62
Irene Hernandez—direct	141	76
Victoria Gonzales—direct	144	78
Paulita Beltran—direct	148	80
Sol C. Chaiken—direct	156	83
Richard Simon (recalled)—		
direct	172	92
cross	174	93
General Counsel's Exhibit 2—Memorandum Agreement, dated August 30, 1957	177	94
General Counsel's Exhibit 3—Memorandum Agreement	179	96
General Counsel's Exhibit 4—Compilation of names of people who worked and were paid by the Company the week ending August 31, 1957	202	112
General Counsel's Exhibit 5—List of persons paid on July 27, 1957 payroll, etc.	207	117
General Counsel's Exhibit 9—Stipulation of testimony	209	119
General Counsel's Exhibit 10—List of names and dates, etc.	213	123
Opinion, Mr. Justice Burton, retired	219	129
Dissenting opinion, Fahy, J.	229	138
Judgment	232	140
Clerk's certificate (omitted in printing)	233	141
Order allowing certiorari	234	141

[fol. A] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15038

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 15079

NATIONAL LABOR RELATIONS BOARD, Petitioner,

—v.—

BERNHARD-ALTMANN TEXAS CORPORATION, Respondent.

ON PETITION TO REVIEW AND SET ASIDE AND FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Joint Appendix—Filed October 29, 1959

[fol. 7]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases No. 39-CA-691
39-CA-729
39-CA-736
39-CA-737
39-CA-738

BERNHARD-ALTMANN TEXAS CORPORATION

and

LOYCE LOVELL, JOHN S. TORRES, JULIA C. CONTRERAS, IRENE PEREZ, MINNIE ESCAMILLA

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, Party to the Contract.

Cases No. 39-CB-191
39-CB-213
39-CB-219
39-CB-220
39-CB-221
39-CB-222

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

and

LOYCE LOVELL, JOHN S. TORRES, IRENE PEREZ, MINNIE ESCAMILLA, JULIA C. CONTRERAS, NINFA M. ESCAMILLA

and

BERNHARD-ALTMANN TEXAS CORPORATION, Party to the Contract.

On July 29, 1958, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceedings, finding that the Respondents had not engaged in and were not engaging in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief; the Respondent Union filed a brief in support of the Intermediate Report.[1]

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and finds merit in the General Counsel's exceptions. Accordingly, the Board adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

The Trial Examiner concluded that the Respondent Company had not violated Sections 8(a)(2) and 8(a)(1) of the Act by executing and maintaining a collective bargaining agreement with the Respondent Union. The Trial Examiner further concluded that the Union had not violated Section 8(b)(1)(A) by executing and maintaining the above agreement. For the reasons stated below, we disagree.

[fol. 9] 1. The Union had been attempting with only partial success to organize the Company's employees at its San Antonio, Texas, plant, since about October 1956. On July 29, 1957, certain of the employees struck in protest against a wage reduction. The Union continued its organizational efforts during the strike, and the Company continued to operate the plant. On August 30, 1957, following negotiations at its main office in New York City, the Company acceded to the Union's claim of majority status and the two parties entered into a "memorandum of understanding"

[1] Except for filing an answer, the Respondent Company did not enter an appearance in this case.

whereby the Company recognized the Union as the exclusive bargaining representative of its "production and shipping employees." This memorandum also provided for, *inter alia*, immediate cessation of the strike, a wage increase, institution of a check-off system for union dues, seniority, arbitration, a no-strike clause, duration, and the drafting of a formal agreement within a specified period. The Employer did not request a check of the authorization cards in the Union's possession, nor did the Union volunteer such cards for a check.[2]

On October 10, 1957, the parties entered into a formal collective bargaining agreement which embodied the terms of the "memorandum of understanding." In this agreement, the unit for which the Union was recognized as exclusive bargaining representative was spelled out as follows: "all non-supervisory production and shipping department workers * * *, excluding among others mechanics, [fol. 10] machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors." This unit description, except for its specificity as to exclusions, conforms to the unit description of the "memorandum of understanding." Neither the earlier memorandum nor the formal collective bargaining agreement contained a union security clause.

In concluding that the General Counsel had failed to sustain the allegations of the complaint, the Trial Examiner relies on the following: (a) the General Counsel's alleged failure to prove a legally appropriate unit; (b) the General Counsel's alleged failure to prove that the Union lacked majority status on August 30, 1957, the date when the "memorandum of understanding" was signed; and (c) even if the Union did not enjoy majority status on the critical date, both the Union and the Company entertained a good faith belief as to the Union's majority status. For the reasons set forth below, we do not agree with the Trial Examiner.

---

[2] The testimony on this point was undisputed. The Union's Regional Director testified that the authorization cards were turned over to the Union's attorney during the negotiations. However, there is no evidence that any sort of card check was ever made.

(a) As stated, the Union contends that the General Counsel must allege and prove that the unit covered by the "memorandum of agreement" is appropriate. We find no merit in this contention. This is not a "refusal to bargain" case. The Respondent Company is charged with having unlawfully contributed support to the Respondent Union by according it recognition as the exclusive bargaining representative of an agreed upon group of employees, although it had no right to act as such representative. The vice of [fol. 11] such action is the extension of recognition.[3] The assistance is not rendered any the less potent and unlawful by the fact that in a "refusal to bargain" case the Board might not find the agreed upon unit appropriate.[4]

(b) On August 30, 1957, the Union held authorization cards from 158 of the Company's employees. On this date, 357 employees were working at the plant, 71 of whom the parties have agreed to exclude from the unit. To the resulting sum of 286 employees, the General Counsel seeks to add 120 employees who worked just before the strike began on July 29, 1957, but who were not working on the critical date. Although the Company's plant manager testified that none of these 120 employees had been terminated and that they were still considered to be employees on the critical date, the Union contends that the General Counsel has failed to prove that they belong in the contract unit. The Trial Examiner did not make a definitive finding as to whether these employees should be included in the unit and we find it unnecessary to do so, for the following reason: Of these 120 employees, 88 had signed Union authorization cards prior to August 30, 1957, and are included in the Union's showing of 158. The Union is, therefore, seeking to

---

[3] See *R. B. Wyatt Manufacturing Co., Inc.*, 117 NLRB 700, 705; *International Metal Products Company*, 104 NLRB 1076, 1077.

[4] Actually, the unit set forth in the contract appears to be appropriate under usual Board standards. In the clothing industry, the Board has found units of production and shipping employees appropriate. *Governdale & Drew, Inc.*, 106 NLRB 1317; *K W B Manufacturing Company*, 106 NLRB 1305. Further, in the absence of any violation of law or policy, the Board customarily finds stipulated or agreed upon units appropriate. See *The Eavey Company*, 115 NLRB 1779, 1780.

count these 88 cards as part of the 158 it held on the critical date while seeking to exclude these 88 employees [fol. 12] along with the rest of the 120, from the unit. These inconsistent positions clearly cannot prevail. Viewing this in the light most favorable to the Union, either 88 cards must be subtracted from the 158, leaving its representative status on the critical date as 70/280,[5] or at least 88 employees must be added to the 286, resulting in a figure of 158/368.[6] Accordingly, the Union could not, under any circumstances, have represented a majority of the employees involved on August 30, 1957. We find, therefore, that the General Counsel has sustained his burden of showing the Union's lack of majority status on the critical date.

(c) The Union contends, and the Trial Examiner appears to agree, that the good-faith belief of both the Company and the Union as to the latter's majority status on August 30 is a defense. We find no merit in this contention. The recognition of, and execution of a collective bargaining contract with, a minority union constitutes unlawful assistance particularly where, as here, the Company made no effort to check the authorization cards against its payroll records.[7] And where an employer has violated the provisions of the Act, his good faith is not relevant.[8]

In view of the foregoing, and upon the record as a whole, we find, contrary to the Trial Examiner, that the Respondent Company violated Sections 8(a)(2) and 8(a)(1) of the Act by executing and maintaining a contract with the Union [fol. 13] which recognized the Union as the exclusive bargaining representative of the employees in the specified unit at a time when the Union did not represent a majority of such employees.

---

[5] Various stipulations would add 12 employees to the unit while subtracting 18 from it, thus yielding a net amount of 6 employees to be subtracted from the unit total. Therefore, 286 minus 6 leaves 280.

[6] See footnote 5, *supra*. 286 plus 88 minus 6 yields 368.

[7] *International Metal Products Company*, 104 NLRB 1076.

[8] See *The Grand Union Company*, 122 NLRB No. 68.

2. We also agree with the General Counsel's contention that the Respondent Union violated Section 8(b)(1)(A) by executing and maintaining the above agreement as the exclusive bargaining representative of certain employees, a majority of whom it did not represent on the date the agreement was executed. Section 7 of the Act guarantees to employees the right to form, join or assist labor organizations *of their own choosing* as well as the right to refrain from such activity. These rights must, of course, be reconciled with the rights of the majority of the employees in any unit. Section 9(a) of the Act provides that the representative chosen by a *majority* of the employees in the unit shall be the exclusive bargaining representative of *all* the employees in that unit. Employees have, therefore, not only the right to be represented only by a majority representative but also the right to bargain independently and individually with their employer in the absence of a majority representative.

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. And there can be no more direct deprivation of these rights, particularly of the right to choose their own bargain- [fol. 14] ing representative or to refrain from so doing, than to impose upon employees a collective bargaining agent they have not chosen. Further, the execution and maintenance of a collective bargaining agreement by an employer and a minority union imposes upon the employees the duty to bargain only through that representative, thus denying to employees the aforementioned right to bargain individually, if they so choose. Therefore, just as an employer violates Section 8(a)(1) [as well as 8(a)(2)] by recognizing and contracting with a minority union, so, too, does a minority union violate Section 8(b)(1)(A) by executing and maintaining a collective bargaining agreement in which it is recognized as the exclusive bargaining representative.[9]

---

[9] Our dissenting colleague relies in part on the assertion that the Union committed no overt act except the mere acceptance of the Employer's proffer of recognition. The record is clear that the

Accordingly, we find that the Respondent Union violated Section 8(b)(1)(A) by executing and maintaining the aforementioned collective bargaining contract at a time when it did not enjoy majority status.

[fol. 15]

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents, as set forth above, which have been found to constitute unfair labor practices, occurring in connection with the operations of the Respondent Company, described in the Intermediate Report, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Bernhard-Altmann Texas Corporation is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Ladies' Garment Workers' Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

Union was actively seeking recognition at the time such recognition was granted. Under these circumstances, we cannot agree that the Union was the passive recipient of an unsolicited gift bestowed by the Company. We hold that the Union was as responsible as the Company for the extension of recognition and, therefore, was equally guilty of violating the Act.

Nor do we rely, in whole or in part, on our previous decision in *Curtis Brothers, Inc.*, 119 NLRB 232, reversed 43 LRRM 2156 (C.A. D.C. 1958). We decide here only that the execution of a collective bargaining agreement with a minority union, whereby that union is recognized as the exclusive bargaining representative of all the employees in the unit, restrains and coerces the employees in that unit, and that this restraint and coercion is practiced both by the company and the union. No additional authority is required beyond the plain words of Section 9(a) of the Act, which restricts the exclusive bargaining representative status to those representatives selected or designated by a *majority* of the employees in the unit.

3. By recognizing International Ladies' Garment Workers' Union, AFL-CIO, as sole bargaining representative, and executing a contract with it, at a time when said Union did not enjoy majority status, Respondent Company has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(2) and 8(a)(1) of the Act.

4. By executing and maintaining the aforementioned collective bargaining agreement, the Respondent Union has restrained and coerced, and is restraining and coercing, [fol. 16] the employees of the Respondent Company in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act.

5. The Respondent Company did not violate Sections 8(a)(3) and 8(a)(1) except as found in conclusion 3, above.

6. The Respondent Union did not violate Sections 8(b)(2) and 8(b)(1)(A) except as found in conclusion 4, above.

The Remedy

Having found that the Respondents have engaged in unfair labor practices, we shall require them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent Company to withdraw all recognition from the Respondent Union as representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment, unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Company's employees. We shall also order the Respondent Company to cease and desist from giving any force or effect to the collective bargaining agreements executed and maintained by the Respondents. However, nothing herein shall be construed as requiring the Respondent Company to vary any [fol. 17] wage, hour, seniority, or other substantive feature

of its relations with its employees which the Company has established in the performance of this contract.

We shall order the Respondent Union to cease and desist from acting as the collective bargaining representative of any of the Company's employees unless and until said Union shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Company's employees. We shall also order the Respondent Union to refrain from seeking to enforce the collective bargaining agreements executed and maintained by the Respondents.

Order

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

I. The Respondent, Bernhard-Altmann Texas Corporation, San Antonio, Texas, its officers, agents, successors and assigns, shall:

(1) Cease and desist from:

(a) Contributing support to International Ladies' Garment Workers' Union, AFL-CIO, or to any other labor organization of its employees;

(b) Recognizing International Ladies' Garment Workers' Union, AFL-CIO, as the representative of any of its employees for the purpose of dealing with the Company con- [fol. 18] cerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Company's employees;

(c) Giving effect to the "memorandum of understanding" dated August 30, 1957, or to the collective bargaining agreement, dated October 7, 1957, between the Respondent Company and International Ladies' Garment Workers' Union, AFL-CIO, or to any extension, renewal or modification thereof: *provided*, however, that nothing in this

Decision and Order shall require the Respondent Company to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the Company has established in the performance of this agreement, or to prejudice the assertion by employees of any rights they may have thereunder.

(d) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from International Ladies' Garment Workers' Union, AFL-CIO, as [fol. 19] the exclusive bargaining representative of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Respondent's employees;

(b) Post at its plant at San Antonio, Texas, copies of the notice attached hereto and marked "Appendix A."[10] Copies of such notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by its authorized representative, be posted by the Respondent Company immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posed. Reasonable

[10] In the event that this Order is enforced by a decree of a United States Court of Appeals, this notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER," the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(c) Post at the same places and under the same conditions as set forth in (a) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Union's notice herein, marked "Appendix B";

[fol. 20] (d) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent Company has taken to comply therewith.

II. The Respondent, International Ladies' Garment Workers' Union, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Acting as the exclusive bargaining representative of any of the employees of Respondent Bernhard-Altmann Texas Corporation for the purpose of dealing with said Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said Union shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Company's employees;

(b) Giving effect to "the memorandum of understanding," dated August 30, 1957, or to the collective bargaining agreement, dated October 7, 1957, between the Respondent Union and Bernhard-Altmann Texas Corporation, or to any extension, renewal or modification thereof;

(c) In any like or related manner, restraining or coercing the employees of Bernhard-Altmann Texas Corporation in the exercise of the rights guaranteed in Section 7 of the [fol. 21] Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmation action which the Board finds will effectuate the policies of the Act:

(a) Post at its offices and meeting hall at San Antonio, Texas, copies of the notices attached hereto and marked Appendix B.[11] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being signed by the Respondent Union's representative, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the Regional Director signed copies of Appendix B, for posting by Respondent Company, at its San Antonio, Texas, plant, as provided above. Copies of said notice to be furnished by the said Regional Director, shall, after being signed by the Respondent Union's representative, be forthwith returned to the Regional Director for disposition by him;

[fol. 22] (c) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order what steps it has taken to comply herewith.

Dated, Washington, D. C.

Feb. 6, 1959.

/s/

.....

Boyd Leedom, Chairman

/s/

.....

Stephen S. Bean, Member

/s/

.....

Joseph Alton Jenkins, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[11] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER," the words "PURSUANT TO A DECREE OF A UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

JOHN H. FANNING, MEMBER, concurring in part and dissenting in part:

In October, 1956, the Union began its organizational campaign among the employees of this Employer. As a result of a wage reduction in the topping department, a strike occurred in July, 1957. Thereafter on August 30, 1957, almost a year after the initiation of the Union's campaign, the Employer recognized the Union as the employees' majority bargaining representative and entered into a "memorandum of understanding" providing for a wage increase for all employees, and other substantial benefits. Although the contract included a provision for the check-off of union dues, there was no requirement that any employee join the Union. Prior to the execution of the contract the Employer had not requested and the Union had not [fol. 23] submitted evidence of its majority status. The record reveals, however, that the Union had made a determination, based upon its estimate of the number of employees in the appropriate unit who had selected the Union as their representative, that it was, in fact, the majority representative. Accepting, as I do, the majority's factual findings, it is apparent that the Union's estimate was wrong. In reaching my conclusion in this case I have been aware of the fact that the Union had engaged in a legitimate organizational campaign, that the resulting contract contains substantial benefits for these employees, and that there is nothing in the record to suggest collusion on the part of the Union and Employer to saddle the employees with a sham contract. Nevertheless, I am satisfied that the principle of law which requires an employer to assure itself of a union's majority status either through a Board election or other competent evidence before extending recognition is a sound one in the field of labor-management relations. Accordingly, I agree with the majority that the Employer's recognition of the Union was premature and in violation of Sections 8 (a) (1) and (2) of the Act.

However, I must disagree with the majority that the Union's acceptance of recognition by the Employer in a contract establishing higher wages and better working conditions for the employees constitutes restraint or coercion of

these employees within the meaning of Section 8 (b) (1) (A). The majority's conclusion is, in my opinion, an extension of a theory repudiated by the only Court of Appeals in which the issue has been litigated. In *Curtis Brothers,* [fol. 24] *Inc., 119 NLRB 232,* a majority of the Board held that peaceful picketing for recognition by a minority union was a violation of Section 8 (b) (1) (A). I was not a Member of the Board at the time this case issued. In subsequent decisions, however, I expressed my disagreement with the majority's legal conclusions as stated in that case. *Andrew Brown Company, 120 NLRB No. 89; Machinery Overhaul Company, Inc., 121 NLRB No. 153.* Recently, the Court of Appeals for the District of Columbia reversed the Board's *Curtis* decision in an opinion adopting the Trial Examiner's and the dissenting Member's views, which conform substantially to my interpretation of this Section of the Act. *Drivers Local 639 v. N. L. R. B., 43 LRRM 2156.* The legislative history of Section 8(b) (1) (A) has been fully set forth in prior decisions of the Board. *National Maritime Union, 78 NLRB 971; Perry Norvell Company, 80 NLRB 225; Curtis Brothers, Inc., supra.* In sum, that history reveals through statements of proponents of the Act such as Senators Taft and Ball that Congress intended to limit the application of the "restrain or coerce" to actual threats, intimidation of employees, violence, "the coercion of goon squads and other strong-arm organizing techniques." 93 Congressional Record A 2252. It was not intended to forbid peaceful organizational activity or, indeed, a strike by a minority union for recognition. Consistent with this legislative history and the court's holding that a *strike* for recognition by a minority union is not violative of Section 8 (b) (1) (A), I cannot agree that an employer's *voluntary recognition* of a minority union imposes upon that union [fol. 25] an unfair labor practice solely on the ground that it *accepted* recognition.

In the *Curtis* case the Union committed an overt act i.e., picketing intended to influence employees not to work. Here the Employer committed the overt act, i.e., extending recognition to a union under the mistaken belief that a majority of employees had, in fact, selected the union for bargaining purposes. The Employer, acting at its peril,

illegally assisted this Union in its organizational drive. To hold, however, as the majority does, that the Union in these circumstances must have *refused* the Employer's proffer of recognition to avoid liability under Section 8 (b) (1) (A) seems to me to go far beyond the Congressional purpose of this Section of the Act, far beyond the already repudiated *Curtis* majority opinion, and beyond the realities and equities in labor-management relations. Here was a Union that fought hard to secure substantial benefits for a group of employees. It did secure these benefits from a reluctant employer in a *contract that did not require any employee to be or become a member of the Union.* The majority nevertheless finds that the employees were restrained and coerced because the Union acted on their behalf and in their interest before it had achieved majority status. Employees, of course, have the unquestioned right to choose their own bargaining representative. But this right should not be confused with the statutory prohibition against restraint or coercion by a union. The one involves a question concerning representation, the other, prohibited conduct that removes from the area of labor-management relations [fol. 26] intimidation and threats to force employees to make one choice or another. A union's claim to recognition is a familiar fact of industrial life. I have found no Board or court decision which suggests that such a claim, admitted by the Employer to be valid, suddenly becomes coercion of employees. Section 9 of the Act specifically provides methods and procedures whereby employees can select or *reject* any union asserting a claim to be, or established as, their bargaining representative. The resolution of representation cases is a matter entirely within the discretion of the Board. It is in this forum that an employer's recognition or nonrecognition of a particular union is subject to defeasance or affirmation. Where the Board is satisfied that a question concerning representation exists, the Statute does not recognize any contract as a restraint upon the right of employees to make a choice for bargaining purposes. In the instant case the employees were free at any time to petition the Board for immediate decertification of the Union. The Board would then in its discretion decide whether or not the contract barred an election. A decision that the contract operated as an effective bar would, it is

true, foreclose the holding of an immediate election, but this restraint upon the right of employees to quickly repudiate an unwanted representative would be imposed not by the Statute, not by the Union, *but by the Board itself.* I cannot agree that the operation of discretionary Board rules is sufficient to create an unfair labor practice where none would otherwise exist. It seems to me the majority tilts at windmills in holding that the bona fide attempt of [fol. 27] a minority union to secure substantial benefits for employees through collective bargaining amounts to unlawful restraint or coercion. I see no wrongdoing here and would not fashion an unfair labor practice out of a mere error in statistics.

Dated, Washington, D. C.

Feb. 6, 1959

/s/

John H. Fanning, Member

National Labor Relations Board

[fol. 29] Appendix A

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT contribute support to International Ladies' Garment Workers' Union, AFL-CIO, or to any other labor organization of our employees.

WE WILL NOT recognize International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive bargaining representative of our employees, unless and until the said labor organization shall have demonstrated its exclusive majority status pursuant to a Board-conducted election among our employees.

WE WILL NOT give effect to the "memorandum of understanding," dated August 30, 1957, or to the collective bargaining agreement, dated October 7, 1957, between International Ladies' Garment Workers' Union, AFL-CIO, and ourselves: *provided,* however, that nothing in this Decision and Order requires us to vary or abandon those wage, hour, seniority, or other substantive features of our relations with our employees, established in performance of any sueh agreement, or to prejudice the assertion by employees of any rights they may have thereunder.

[fol. 30] WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

All our employes are free to become, to remain, or to refrain from becoming or remaining members of the abovenamed labor organization or any other labor organization.

BERNHARD-ALTMANN TEXAS CORPORATION
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted sixty (60) days from the date hereof and must not be altered, defaced, or covered by any other material.

[fol. 31] APPENDIX B

NOTICE TO ALL MEMBERS OF INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO AND TO ALL EMPLOYEES OF BERNHARD-ALTMANN TEXAS CORPORATION, SAN ANTONIO, TEXAS

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT act as the exclusive bargaining representative of any of the employees of Bernhard-Altmann Texas Corporation, San Antonio, Texas, unless and until we shall have demonstrated our exclusive majority representative status pursuant to a Board-conducted election among the employees of the said Company.

WE WILL NOT give effect to the "memorandum of understanding," dated August 30, 1957, or to the collective bargaining agreement, dated October 7, 1957, between Bernhard-Altmann Texas Corporation and ourselves, or to any extension, renewal or modification thereof.

WE WILL NOT in any like or related manner restrain or coerce the employees of Bernhard-Altmann [fol. 32] Texas Corporation in the exercise of the rights guaranteed in Section 7 of the Act.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This notice must remain posted sixty (60) days from the date hereof and must not be altered, defaced, or covered by any other material.

[fol. 33]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners, Washington, D. C.

Cases Nos. 39-CA-691, 39-CA-729, 39-CA-736, 39-CA-737, 39-CA-738

BERNHARD-ALTMANN TEXAS CORPORATION

and

LOYCE LOVELL, JOHN S. TORRES, JULIA C. CONTRERAS, IRENE PEREZ, MINNIE ESCAMILLA

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Party to the Contract

Cases Nos. 39-CB-191, 39-CB-213, 39-CB-219, 39-CB-220, 39-CB-221, 39-CB-222

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

and

LOYCE LOVELL, JOHN S. TORRES, IRENE PEREZ, MINNIE ESCAMILLA, JULIA C. CONTRERAS, NINFA M. ESCAMILLA

and

BERNHARD-ALTMANN TEXAS CORPORATION

Party to the Contract

Mr. Franklin R. Sears, for the General Counsel.

Messrs. Charles J. Morris (Mullinax, Wells & Morris) of Dallas, Tex., and *Sol C. Chaikin*, both of Dallas, Tex., for the Respondent ILGWU.

[fol. 34] INTERMEDIATE REPORT—July 29, 1958

Statement of the Case

The above-entitled cases having been consolidated, on April 25, 1958, as to each of the two Respondents, by order of the General Counsel for the National Labor Relations Board, and a complaint as to each consolidated group having been issued and served by said General Counsel, a hearing was held in San Antonio, Texas, on June 4, 5, 6, 7, 9, and 10, 1958, before the undersigned Trial Examiner.

Both complaints are based upon charges duly filed and served. That issued against the Respondent Employer alleges in substance, after amendment during the hearing, that it has violated Section 8 (a) (1), (2), and (3) of the National Labor Relations Act, as amended (61 Stat. 136), by: (1) entering into certain exclusive recognition agreements with the Respondent Union at times when said Union did not represent an uncoerced majority of employees in an appropriate unit covered by said contracts; (2) discriminating as to the conditions of employment of employees Minnie Escamilla and Julia Contreras, in order to encourage membership in the Respondent Union; and (3) thus interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

The complaint against the Respondent Union alleges in substance, after amendments during the hearing, that it has violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act, by: (1) entering into the said agreements with the Respondent Employer; (2) causing the Respondent Em-
[fol. 35] ployer to discriminate, in violation of Section 8 (a) (3), against the two above-named employees; and (3) thus restraining and coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

In their answers, the Respondents denied commission of the alleged unfair labor practices. At the hearing General Counsel and the Respondent Union were represented by counsel. No appearance was made for the Respondent Employer. Full opportunity was afforded counsel to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs and pro-

posed findings and conclusions of law. Comprehensive briefs have been received from General Counsel and the Union.[1]

At the conclusion of the hearing ruling was reserved upon a motion by the Union to dismiss the complaint against it for failure of adequate proof. Said motion is disposed of below by the following findings, conclusions, and recommendations.

Upon the entire record and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The business of the Respondent Employer

Bernhard-Altmann Texas Corporation is a Delaware corporation, with principal office and place of business in San [fol. 36] Antonio, Texas, where it is engaged in the manufacture of knit wear.

At its San Antonio plant, during the 12-month period before issuance of the complaint, said Employer purchased and had shipped to it from points outside Texas various types of yarn valued at more than $1,000,000. During the same period it sold and shipped outside Texas, from its San Antonio plant, finished products valued at more than $1,000,000.

The Respondent Employer is engaged in commerce within the meaning of the Act.

II. The labor organization involved

International Ladies' Garment Workers' Union, AFL-CIO, is a labor organization admitting to membership employees of the Respondent Employer at its San Antonio plant.

---

[1] At this point the Trial Examiner desires to record his appreciation for the industry and earnest endeavor displayed by both counsel, during recesses of hearing sessions and many hours outside the hearing, in examining voluminous employer and union records and from them compiling and preparing various lists which were then placed in evidence by agreement. Their efforts succeeded in holding to a minimum what otherwise might have been an extremely long record.

III. The alleged unfair labor practices

A. Setting and major issues

In summary, the following facts broadly outline the setting in which General Counsel claims, both the Employer and the Union engaged in conduct violative of the Act:

(1) At the San Antonio plan of some 400 persons, employees began signing union authorization cards in the fall of 1956. Stipulated evidence shows that in varying number employees continued, from October 1956, to September 1957, thus to designate the Union as their bargaining representative.

[fol. 37] (2) There is no claim or evidence that during the Union's organization campaign any other labor organization was similarly engaged.

(3) Throughout this campaign the Employer vigorously opposed the Union's efforts. (General Counsel conceded; "I will be glad to stipulate with counsel that there was an area or situation of antipathy between the company and the Union prior to the entrance of the memorandum agreement * * * and the employees were aware of it * * *."

(4) In protest against a wage reduction imposed by the Employer in one of its departments, a substantial number of employees struck on July 29, 1957, and remained on strike until August 30.

(5) On the latter date, following protracted negotiations between top officials of both the Employer and the Union in New York City, the parties executed a "memorandum of understanding" which, among other things, provided for:

a. immediate cessation of the strike.

b. recognition of the Union's claim of majority representation for "all production and shipping employees."

c. an increase in wages.

d. institution of a check off system for union dues.

e. no strike or lockout.

f. drafting of a formal agreement within a specified period.

[fol. 38] (6) Shortly after the execution of this memorandum and cessation of the strike, management officials at the San Antonio plant informed employees generally of the memorandum and urged those who had not already done so to join the Union, in the interest of developing amicable relations after so long a period of bitter dispute.

(7) On October 10, 1957, the two parties entered into a formal contract, in which the Employer agreed to recognize the Union as the "executive bargaining representative" for "all non-supervisory production and shipping department workers * * * excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors."

(8) It is here noted, and emphasized, that neither the August 30 memorandum nor the October 10 contract contains *any provision requiring membership in the Union as a condition of employment.* Nor is there credible evidence that after August 30—or before, for that matter—any employee was told by any management or union representative that he or she must join the Union. On the contrary, while there is credible evidence that after the conclusion of the strike employees were urged to join, both by management and union officials, they were specifically informed that such action was not compulsory.

Reduced to its simplest terms, the nub of General Counsel's case appears to rest upon his claim the Employer violated the Act on August 30, by rendering illegal support [fol. 39] and assistance to the Union in signing the memorandum of understanding which recognized it as the exclusive bargaining representative of employees "in the collective bargaining unit covered by such agreement at the time of its execution, as required by Section 9, subsection (a) of the Act," at a time when the Union "did not represent an uncoerced majority of the employees" in the said unit.

That General Counsel himself considers the critical issue to be determination of the majority question on August 30 is indicated by the following quotation from his able brief:

> Counsel for General Counsel respectfully submits that the subsequent status of the Respondent Union has no bearing whatsoever. Whether or not a majority status was attained subsequent to the execution of the memorandum agreement as of August 30, 1957, does not in any way materially affect the determination of the Complaint and the hearing. Whether or not the Respondent Company and the Respondent Union are found to have coerced employees subsequent to August 30, 1957, does not control, since the memorandum agreement executed as of August 30, 1957, recognized the Union as the majority representative of the employees covered under the terms and conditions of that agreement. The subsequent agreement * * * is no more than a modification and formalization of the contract according to the terms of the memorandum agreement.

Consideration will therefore be first given to the critical point of the August 30 memorandum.

[fol. 40] B. *The August 30 memorandum*

Early during the hearing counsel for the Union urged dismissal of the complaint against it, claiming that it was defective in that it failed to allege specifically what the appropriate unit was, on August 30. In reply General Counsel said:

> Well, I cannot bind the Board by stating what is an appropriate unit. But on the basis of the contract and the individuals that are covered under the contract in this unit, it is our position that the Union did not represent an uncoerced majority of these people.

The next day, however, General Counsel amended his complaint by alleging:

> As of on or about September 1st, 1957, Respondent Union did not represent a majority of the employees in the unit as set forth and described in the contract by

and between the Respondent Union and the Bernhard-Altmann Texas Corporation, entered into and executed on or about the aforesaid date.

At no point, however, has General Counsel alleged or defined an "appropriate unit," within the meaning of Section 9 (a) of the Act, although in his complaint against the Respondent Employer, he specifically invokes that section, in reference to the same contract.

Deferring at least for the moment the question as to whether or not the complaints were fatally defective—in that they failed to provide the parties with a clear and specific allegation defining his claim as to a legally appropriate unit, the Trial Examiner sets out the following observations, and certain relevant facts.

[fol. 41] 1. Other than by speculation, inference, or assumption, the Trial Examiner is unable from the record to determine the precise definition of the unit in which General Counsel claims the Union did *not* represent a majority on August 30.

2. The state of the record does not afford a competent array of facts from which accurate calculation can be made as to the precise *number of employees, in any unit*, actually on the payroll and properly to be counted, as of August 30.

As to observation 1: Certain inconsistencies in the pleadings themselves have been noted above. It has also been noted that while the August 30 memorandum refers to a broad unit of "all production and shipping employees," with no exclusions cited, the October 10 contract again refers to "production and shipping department workers" but specifically *excludes* some 13 separate groups of employees.

During the course of the hearing, particularly when identifying certain documents, General Counsel made it apparent that he was really contending that the unit to be considered was that containing the exclusions cited in the October 10 contract. And in his brief he refers to "the *unit* described in General Counsel's Exhibits 2 and 3"—which are, respectively, the agreements of August 30 and October 10.

As to observation 2: In evidence are 2 lists of employees: one of some 287 individuals purportedly working during

the week ending August 31, and another of about 120 individuals purportedly working during the week ending July 27, but not on August 31.

[fol. 42] There is competent evidence, elicited by General Counsel, that the list of 287 does not include any "clericals, plant clericals, watchmen and plant supervisors," but no evidence of a persuasive nature that it does not include employees in any or all of some 9 or 10 *other* categories excluded in the October 10 contract.

As to the second list of about 120 employees, the record does not permit an accurate finding as to how many of them should properly be counted as being on the payroll as of August 30. Nor is there any evidence as to whether or not any of these more than a hundred individuals, if properly to be counted as on the payroll, were actually in any of the excluded categories. The plant manager himself admitted that some of such individuals may have been terminated before August 30.

A further example of uncertainty involves a group of some 25 individuals, unidentified, who were hired during the strike. Although the plant manager, Richard Simon, testified that he considered such hirings to be permanent, it is undisputed that Simon's superiors, during the New York negotiations, informed the Union that such persons were only *temporary* employees.

Before drawing conclusions from the above observations, relative to the majority question on August 30, consideration should be given to other factors bearing upon the whole question of illegal recognition.

First, it should be emphasized that in this case there is no "sweetheart" contract element. At no time, so far as the [fol. 43] record shows, was there any other labor organization in the picture. For a period of some 8 to 9 months before the strike the Union had been organizing *employees* —*not* "organizing the employer," and actually in the face of open opposition on the part of the employer. Before entering into the August 30 agreement, the employer had obvious reason to believe, since a substantial proportion of his employees had been on strike for a month, that the Union represented a good part of his employees.

And although no specific figures were cited, the testimony of Sol Chaikin, the Union's Regional Director, is un-

challenged that "on at least two occasions" during the week of negotiations in New York he was advised as to the number of employees whom the Employer "had determined would be working for them or eligible to join the union," and that from cards brought to New York and other information received from San Antonio he was convinced that his organization represented a majority before the claim of majority was made.

It is clear that the Employer did not demand an actual accounting, and there was no determination of majority by way of applying signed cards to any payroll. Obviously such a payroll list would have been impractical if not impossible at that time—for the plant was still struck.

All such evidence leads to the reasonable conclusion that both parties were acting in good faith on August 30: the Union in claiming majority, and the Employer in accepting the claim. There is no hint of collusion or "conspiracy" between the parties, as suggested by General Counsel.

[fol. 44] C. *Conclusions as to the majority status*

The Trial Examiner is convinced, from all the evidence, that the Employer and the Union entered into the August 30 memorandum understanding in good faith. And the existence of at least some 150 cards conceded by General Counsel as probably validly signed, is plainly not an insignificant proportion of some 250-400 employees in various possible units. In any event, the proportion is admittedly such that in a state of uncertainty there is no sure basis for an inference that the Union did not, and could not have, represented a majority in any appropriate unit.

In view of the foregoing factors, it seems to the Trial Examiner that the burden, of providing clear and unequivocal proof to support his claim that the Union *did not* represent a majority, rests even more heavily upon General Counsel than in a situation such as he cites in *Coast Aluminum Company*,[2] where the employer not only entered into an exclusive bargaining agreement with a union *before* the latter had any representation among employees, but then proceeded to do the organizing for the Union himself. And this burden, the Trial Examiner believes, has not been convincingly borne.

---

[2] 120 NLRB No. 173.

As it stands, the record provides no reasonable basis for other than a number of speculative possibilities, both as to what an appropriate unit was on August 30, 1957, and as to precisely how many employees were properly to be counted within any or all of these possible units.

[fol. 45] It is a mathematical certainty, the Trial Examiner believes, that dividing a variable even by a constant —or a constant by a variable—can bring only a variable answer. Accuracy in calculating a majority is defeated when any one of the essential factors is uncertain.

In short, the Trial Examiner concludes and finds that the allegations that the Union did not represent a majority of the employees on August 30, 1957, is not sustained by a preponderance of the credible evidence. It follows, and is concluded and found, that all other allegations with reference to the agreements (since the claim of illegality is based upon the question of majority representation), are not sustained by the evidence.

D. *The claimed incidents of coercion*

General Counsel offered evidence as to only two alleged incidents of specific Employer coercion, designed to force an employee into the Union.

One incident involves employee Minnie Escamilla. As to her, evidence is to the effect that in October, after execution of the formal contract and upon protest of the Union that certain contract terms were being violated, the Employer withdrew a raise it had promised Escamilla during the strike and had given her sometime in September. Two witnesses besides Escamilla testified for General Counsel on the matter: Plant Manager Simon and Production Manager Kovalski. Despite the denials of such allegations in the Respondent Employer's answer, Simon and Kovalski cheerfully and willingly testified to the contrary, and ad-[fol. 46] mitted that they told Escamilla, after withdrawing the raise, that she would probably get it back if she joined the Union. The Trial Examiner believes neither Simon nor Kovalski. Although it is clear that there was but one occasion when Escamilla was called into the office to be told that her raise was being withdrawn, the testimony of Simon and Kovalski is in sharp conflict as to who was pres-

ent. Simon said he was not sure Kovalski was there. Kovalski said only he, a union official and Vice-President Plecher were present—and he later admitted that no union official was there. Even Escamilla—whose testimony is replete with self-contradictions—makes no mention of Simon being present or saying anything to her. Since both Simon and Kovalski admitted that the Union's protest was based entirely upon the contract provisions, it is plain that no occasion could have arisen for either of them voluntarily to have tried to force Escamilla to join the Union to get her raise back.

The Trial Examiner finds insufficient credible evidence to support the allegations of the complaint with respect to Escamilla.

The second incident involves employee Julia Contreras who, although she appears to have signed a charge, was not called as a witness. Thus the record is barren of any testimony from the person alleged to have been "coerced." As in the case of Escamilla, Kovalski willingly admitted that either he or Plecher had told her that she would get a raise if she joined the Union. On cross-examination, however, Kovalski admitted facts of the situation which make it [fol. 47] plain that there was no occasion for any member of management thus coercing her. He finally admitted that the Union itself, at a time when Contreras was not a member, protested that the Employer had erred in her seniority and insisted that she be accorded her proper place and the consequent raise. He also admitted that the Union did not condition her getting a raise upon joining. The Trial Examiner cannot believe Kovalski's claim of coercion. Both his testimony and his demeanor raised more than a faint suspicion that he felt it to be his interest to admit coercion in order to get the contract set aside.

E. *Conclusions in summary*

As noted heretofore, General Counsel apparently rested the major part of his entire case upon the single question of the Union's majority on August 30. Had he succeeded in proving that the memorandum of understanding was violative of the Act, the admitted and proven fact that management officials agreed to and did urge employees to join,

after its signing, would have assumed greater significance. Under the circumstances, however, the contract not being proven illegal, the Trial Examiner perceives nothing in the evidence which establishes that either before or after August 30 has either the Employer or the Union exceeded the free-speech privileges accorded by Section 8(c) of the Act. There is no credible evidence of economic threats or of promises of benefit made conditional upon employees joining.

[fol. 48] The Trial Examiner therefore concludes and finds that the preponderance of credible evidence is insufficient to sustain allegations of unfair labor practices by either of the Respondents.

Upon the basis of the foregoing findings and conclusion of facts, and upon the entire record in the case, the Trial Examiner makes the following:

Conclusions of Law

1. International Ladies' Garment Workers' Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Bernhard-Altmann Texas Corporation is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

3. Bernhard-Altmann Texas Corporation has not engaged in unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3) of the Act.

4. International Ladies' Garment Workers' Union, AFL-CIO, has not engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act.

RECOMMENDATIONS

It is recommended that the complaints be dismissed in their entirety.

Dated at Washington, D. C., this 29th day of July 1958.

/s/ C. W. WHITTEMORE

C. W. Whittemore
Trial Examiner

[fol. 49]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH REGION

Cases No. 39-CA-691
39-CA-729
39-CA-736
39-CA-737
39-CA-738

In the Matter of:

BERNHARD-ALTMANN TEXAS CORPORATION

and

LOYCE LOVELL, JOHN S. TORRES, JULIA C. CONTRERAS, IRENE PEREZ, MINNIE ESCAMILLA

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Cases No. 39-CB-191
39-CB-213
39-CB-219
39-CB-220
39-CB-221
39-CB-222

In the Matter of:

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

and

LOYCE LOVELL, JOHN S. TORRES, IRENE PEREZ, MINNIE ESCAMILLA, JULIA C. CONTRERAS, NINFA M. ESCAMILLA

and

BERNHARD-ALTMANN TEXAS CORPORATION

[fol. 50]

Transcript of Proceedings—Wednesday, June 4, 1958

215 U. S. Post Office Building,
San Antonio, Texas.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a. m.

Before: C. W. Whittemore, Trial Examiner.

APPEARANCES:

Franklin R. Sears, Esq., 300 West Vickery, Fort Worth, Texas, appearing as counsel for General Counsel.

Mullinax, Wells & Morris, By: Charles J. Morris, Esq., 1610 National Bankers Life Building, Dallas, Texas; and,

Sol C. Chaikin, 1008½ Wood Street, Dallas, Texas; both appearing on behalf of the Respondent Union.

* * * * * * *

[fol. 51] Trial Examiner: Are there any motions at this time?

Mr. Morris: At this time I would like to raise a motion to dismiss by dictating it into the record, Mr. Examiner, if I may.

Trial Examiner: All right.

MOTION OF RESPONDENT UNION TO DISMISS COMPLAINT

Mr. Morris: Respondent Union in all of the instant cases hereby moves to dismiss the complaint in all of said cases for the reason that the same fails to state a violation of the Act. In particular fails to allege the following:

In connection with paragraph 5 of the complaint there is no allegation there or elsewhere in the complaint as to the appropriate unit in which the Board is contending the Union did not have an uncoerced majority.

[fol. 52] Furthermore, in connection with paragraph 5, and the matters related there, there is no allegation in the complaint that any act of coercion existed either on the part of the Company or on the part of the Union prior to September 1, 1957.

In connection with paragraph 8, and the matters relating thereto, the complaint again fails to allege the appropriate unit and furthermore, nowhere does the complaint allege that the union on or about the time the second contract was signed, which contract is referred to in paragraph 8 as on or about October 7 and executed on or about November 7, 1957, that the union did not represent a majority at such time, nor is there any allegation that such majority was the result of any coercion either on the part of the Union, the Company or both.

Wherefore, we move that the complaint be dismissed.

* * * * * * *

[fol. 53] Mr. Sears: I move to amend paragraph 5 of the complaint against the Respondent Union to read as of on or about September 1, 1957 Respondent did not represent an uncoerced majority of the employees at the Company's San Antonio, Texas plant or at any time thereafter.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Sears: I move to amend paragraph 8 to read on or about October 7, 1957 a subsequent contract was entered [fol. 54] into modifying and extending the contract entered into on or about the first part of September by and between the Respondent Union and the Company, at which time the Union did not represent an uncoerced majority of the employees at the Company.

I also move to amend paragraph 11 to make it more specific by alleging in the last line of paragraph 11 that it be amended to read Section 8(b)(1)(A).

I have no further motions at this time.

Trial Examiner: All right. Do you have any objection to the motions?

Mr. Morris: Mr. Examiner, I call attention to the fact that paragraph 8 refers to a contract entered into and executed on or about November 7th.

Mr. Sears: October 7th.

Mr. Morris: I call attention to the fact that it says November 7th, although the phrase, October 7th, is used in the first portion of the contract.

The amendment which was just made would amend the first portion, but would not amend as to whether or not the Union represented an uncoerced majority on or about November 7, 1957.

Trial Examiner: Well, I have forgotten whether his proposed amendment included as it did in the other one—

Mr. Morris: It didn't.

[fol. 55] Trial Examiner: —and thereafter.

Do you recall, Mr. Sears?

Mr. Morris: The language he used, Mr. Examiner, was at which time, referring to the date, October 7th.

Trial Examiner: All right.

Mr. Sears: May we have a moment here to check and find out the exact date this contract was entered into?

Trial Examiner: All right.

Be off the record for that purpose.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Sears: Move to amend the last sentence of paragraph 8 to strike November 7th and make it October 7th, 1957.

* * * * * * *

[fol. 56] Mr. Morris: All right.

I further call attention, however, to the fact that there has still been no amendment with regard to the appropriate unit.

We think we are entitled to know whether or not Mr. Sears is relying upon the same units referred to in the contracts or relying upon different units.

* * * * * * *

Trial Examiner: Now comes the question as to whether or not the amendments have sufficiently taken care of your motion to dismiss. Now, you just indicated that at least one respect you did not think it did. Now, if you wish to elaborate on that point, you may do so. You still urge, as I understand it, the motion to dismiss since there is no allegation of appropriate unit as to either the original contract or the second contract?

[fol. 57] Mr. Morris: Plus the fact that there is still no allegation that either the Union or the Company engaged in

any coercive activity prior to the first contract on or about September 1st. No allegation whether or not there was a majority other than the allegation of failure to have an uncoerced majority as of that time.

However, in connection with that, there is no allegation as to what the appropriate unit is. I think we are entitled to know whether or not the Board is adopting the unit which the parties agreed was appropriate in their various contracts.

Trial Examiner: Well, while it seems to me that the burden of proving a majority or a lack of majority is upon the party who makes the allegation, and although that is an issue which we may have to take up later, I do think that it would be appropriate at least to ask General Counsel why he has not seen fit to allege an appropriate unit since in ordinary circumstances the allegation of an appropriate unit is included.

Is there any reason why you did not allege an appropriate unit?

Mr. Sears: Well, I cannot bind the Board by stating what is an appropriate unit. But on the basis of the contract and the individuals that are covered under the contract in this unit, it is our position that the Union did not represent an uncoerced majority of these people.

[fol. 58] Trial Examiner: Of the unit set out in the contract?

Mr. Sears: In the contract.

Trial Examiner: Well, now, that, I think, is what Mr. Morris was getting at. Now, if that is your allegation, I think it is an appropriate one. I can see where you don't want to get into the question of appropriateness, but if you are alleging that in the unit covered by the contract the Union didn't represent a majority, I see no reason why you should not amend your complaint to at least so indicate. However, I will ask Mr. Morris if he will accept the statement of General Counsel in lieu of making a formal amendment to the complaint.

He has stated now what he means by a majority. It is a majority of the employees in the unit set out in the contracts.

Mr. Morris: Is the General Counsel saying that he is not claiming nor will he claim in this proceeding that the unit set out in the contract is inappropriate, and furthermore, that the allegations with regard to the failure of the Union to have an uncoerced majority refers to such majority within the unit set out in various contracts? Is that the General Counsel's statement?

Trial Examiner: Well, I think in substance he makes certainly no claim that the unit set out in the contract is inappropriate. He is not claiming what unit is appropriate in the sense of a Board certification. He is simply stating [fol. 59] that, as I understand it, that the Union did not at the material times represent an uncoerced majority in that unit, which is set out in the separate contracts.

Is that a—

Mr. Sears: That is correct.

Mr. Morris: I am afraid I could not accept merely the statement, Mr. Examiner. I feel that it is important for the complaint, in order to be complete, to include at least its definition of an appropriate unit, and an allegation that we do not represent an uncoerced majority within such unit.

Now, if the unit happens to be the same as the one which has been set out in the contracts, then I think it's incumbent upon the General Counsel to so state.

• • • • • • •

Mr. Sears: In view of an off the record discussion with counsel for Respondent Union, I further move to amend [fol. 60] paragraph 5 of the complaint against the Respondent Union to strike in the second line the word "uncoerced."

• • • • • • •

[fol. 61] Mr. Sears: This will be paragraph 8a. I move to amend to include this paragraph to read as follows:

As of on or about September 1st, 1957 the Respondent Union did not represent a majority of the employees in the unit as set forth and described in the contract by and between the Respondent Union and the Bernhard-Altmann, San Antonio, Texas Company. Correction, that is Bernhard-Altmann Texas Corporation. Entered into and executed on or about the aforesaid date.

As of on or about October 7, 1957 the Respondent Union did not represent an uncoerced majority of the employees in the unit as set forth and described in the contract by and [fol. 62] between the Respondent Union and the Bernhard-Altmann Texas Corporation entered into and executed on or about the aforesaid date.

* * * * * * *

Mr. Morris: I have no objection to the General Counsel's amending his complaint in the manner he stated at this time.

I do not, however, waive nor do I withdraw my motion to dismiss in which I raised certain objections with regard to failure to allege an appropriate unit.

Trial Examiner: Very well. I will grant the motion to amend.

* * * * * * *

[fol. 63] RICHARD A. SIMON a witness called by and on behalf of the General Counsel under Rule 43(b), being first duly sworn, was examined and testified as follows:

Direct examination.

[fol. 64] By Mr. Sears:

Q. Would you state your name, please?

A. Richard A. Simon.

Q. And your occupation.

A. Plant Manager, Bernhard-Altmann Texas Corporation.

Q. How long have you been Plant Manager?

A. Approximately three years.

Q. What type of business is the Bernhard-Altmann Texas Corporation engaged in?

A. In the manufacture of sweaters.

Q. Mr. Simon, do you recall entering into a contract or memorandum agreement, either yourself or a representative of your Company, sometime during the latter part of August or first part of September of 1957?

A. I do.

Q. Was this contract or memorandum agreement with the International Ladies' Garment Workers' Union?

A. It was.

• • • • • • •

[fol. 65] Mr. Sears: All right. I offer this document marked GC-2 as General Counsel's Exhibit No. 2, a memorandum or understanding between the Bernhard-Altmann Texas Corporation and Local 590, International Ladies' Garment Workers' Union.

[fol. 66] Trial Examiner: Any objection, Mr. Morris?

Mr. Morris: No objection.

Trial Examiner: It may be received.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

By Mr. Sears:

Q. Mr. Simon, do you recall whether or not a contract was entered into by and between the Bernhard-Altmann Texas Corporation and the International Ladies' Garment Workers' Union on or about October 7th?

A. Yes, sir, there was.

Q. Do you have a copy of that contract, sir?

A. I do.

• • • • • • •

Mr. Sears: The following document marked for identification as GC-3, an agreement between the Bernhard-Alt-
[fol. 67] mann Texas Corporation of San Antonio, Texas and Local 590, International Ladies' Garment Workers' Union, dated the 7th day of October 1957.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Mr. Sears: I now offer these documents, with a duplicate, in evidence, as General Counsel's Exhibit 3.

• • • • • • •

[fol. 68] By Mr. Sears:

Q. Mr. Simon, do you have in your possession a list of the people on the payroll of your company as of August 31, 1957?

Mr. Morris: I am going to object to the question because the use of the word "payroll" is ambiguous, Mr. Examiner. It's not clear to me whether counsel for General Counsel is asking for those people who were actually employed and paid as of the week ending August 31, 1957, or whether he is asking for a larger list than that.

I request the question be clarified.

By Mr. Sears:

Q. I will clarify it on the basis of those people who were employed and paid.

A. I do.

* * * * * * *

[fol. 69] Mr. Sears: I mark for identification now as GC-4 a list of names purporting to be a true and correct copy of [fol. 70] people who worked and were paid by the Company through the week ending August 31, 1957. I will offer—

Trial Examiner: Well, may I simply suggest you amend that, if it's to be a copy, what is it a copy of? I understood it's a compilation taken from Company records.

Mr. Sears: This is a list composed of names taken from the Company's payroll records.

Trial Examiner: But it's not a copy of anything, it's not a copy of the payroll, I am sure.

Mr. Sears: No, it is a—

Trial Examiner: It is a compilation of information taken, as I gather from what Mr. Simon said, from the payroll records.

Mr. Sears: That is correct.

Trial Examiner: All right.

Mr. Morris: May I make a statement in connection with my previous statement that I was not objecting to such a list going into the record. I want to be very careful on one point.

I do not object to counsel putting into the record—I assume that this is what this is—a list of persons paid and

persons who were working for the Company during the week of August 31, 1957. If this is what GC-4 is, I raise no objection to that.

I do object to GC-4 being a compilation of employees as such for the reason that—

[fol. 71] Trial Examiner: No, no, I didn't intend to indicate that. But it's a compilation of employees who were, as you say, working—

Mr. Morris: No, I go beyond that. I do not concede that all of the persons on this list are employees within the meaning of the Act. There were some temporary personnel on this payroll.

I do not object to this going into evidence as indicating those persons who were working but in not objecting I do not concede that all of these persons were employees within the meaning of the Act.

Trial Examiner: Well, it wasn't offered as such.

Mr. Morris: And it is my understanding that it is not offered as such, is that correct?

Trial Examiner: Well, he, at least, in his offer he didn't make that statement. He said employees working and on the payroll during the week ending August 31.

Mr. Morris: My objection was to the use of the word "Employees" as being broad, but I want my statement to qualify this.

Trial Examiner: Well, I think you have indicated—Mr. Sears has certainly indicated his willingness that any point you wish to raise as to the accuracy or any point about the document, he is perfectly willing that you should do so at any time. You don't forgo any rights in such respect.

[fol. 72] He has offered it simply as a list turned over to him by a company representative purporting to be precisely what he said it purported to be.

Now, he didn't say actually that it did. He left it open for further examination by you at any time as to its accuracy or authenticity.

* * * * * * *

[fol. 73] By Mr. Sears:

Q. Mr. Simon, I am handing you a document marked GC-4, which you gave to me earlier.

This is a compilation of names of people who worked and were paid by the Company the week ending August 31, 1957?

A. Yes, sir.

Q. There appears to be on this list names that are circled. Did you circle these names?

A. I did.

. . . . . .

[fol. 74] By Mr. Sears:

Q. Mr. Simon, during the two years preceding the contract or memorandum agreement that was entered into on or about August 30 of 1957, did your company have a policy in regard to the employee status of employees following lay-offs?

A. Yes, sir.

. . . . . .

[fol. 75] By Mr. Sears:

Q. You said you initiated this policy, sir. Would you please describe it?

A. That all employees who were laid off for lack of work for a period of more than 30 days were dropped from the payroll or terminated.

Q. When were they terminated?

A. At the end of 30 days.

Q. That if an employee was laid off on the first of June, that if he did not return to work by June 30th he was then terminated?

A. Yes, sir. There were several reasons for that. The main reason is that it tied in with our insurance policy. [fol. 76] That is how I happen to know it was carried out. Our insurance policy, the company was notified after 30 days of an employee not working.

Q. So that you followed the policy when you laid off someone at the end of 30 days—

A. We terminated, moved their card over to an inactive or terminated file and notified the insurance company.

Q. That the employee was terminated?

A. Right.

Q. Did you find at any time that you made exceptions to this policy?

A. Well, I am sure exceptions were made.

Q. But this was the general policy that you followed?

A. This was the policy as outlined. I am sure exceptions were made. Those people that handled the actual mechanics would be in a much better position to give the answer than myself.

Mr. Morris: All right. At this time I think the witness has indicated that he is not qualified to give the details as to this policy, and I move to strike the testimony with regard to the policy.

The Witness: I have already answered in details.

Trial Examiner: Well—

Mr. Sears: He was referring to the mechanics.

Trial Examiner: No, I will permit his testimony to re- [fol. 77] main. He's qualified it that none of us to the extent that—he's already, as to the details, testified. But he's stated that he can't go forward and others would be better qualified to testify.

He's admitted that whatever the practice was, as he knew it, there were exceptions made.

By Mr. Sears:

Q. Mr. Simon, did you prepare a list of names from your payroll records of the people who worked and were paid by your Company during the last pay period in July but were not on the payroll as being paid as of August 31st?

A. I believe I have that list.

• • • • • • •

By Mr. Sears:

Q. So for the purpose of the Company's policy, were these people terminated, do you know, as of August 31?

A. If I remember correctly, they started to terminate all these people, and in view of the fact that it was apparent

[fol. 78] that the strike was about over, and there were certain people out, I did not have them terminate these individuals.

Q. So that—

A. Some may have been, but I don't think all of them were terminated.

• • • • • • •

[fol. 79] By Mr. Sears:

Q. Mr. Simon, on this list of persons paid on July 27, 1957, but not appearing on the August 31, 1957 payroll, do you know whether or not any of these people worked between July 27 and August 31? Now, I want to know specifically whether or not you know that all of these people did work at some time or some of them did work at some time or do you know that none of these people worked between July 27 and August 31?

A. That list referred to, only indicates whether a person was working in the week of July 27 and not paid on August 30th. That list may, and I know includes some people who did and some people who did not get paid sometime during the month of August with the exception of the last August payroll.

• • • • • • •

[fol. 80] Mr. Sears: For the purpose of identification, I will mark this as GC-5.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

Mr. Sears: I am not offering these lists in evidence at this time.

Trial Examiner: You are simply having it marked for purposes of identification so if it comes up later, you will know.

Let me just see if I understand clearly what it is. It's a list of persons that were working at the plant on July 27 but were not working and on the payroll on August 31?

The Witness: That's correct, sir.

Trial Examiner: And that is all it is?

Mr. Sears: That is correct.

Trial Examiner: All right.

Mr. Morris: May I add this:

You said on August 31. I think it would mean any time within the week ending August 31.

The Witness: Yes.

• • • • • • •

[fol. 81] By Mr. Sears:

Q. Mr. Simon, on or about August 31, 1957 did you have a meeting with plant personnel consisting of supervisors, in your office?

A. I did.

Mr. Morris: What is that date again, please, sir?

Mr. Sears: August 31.

Mr. Morris: Thank you.

By Mr. Sears:

Q. This was the day following the signing of the memorandum agreement?

A. It was.

Q. Where was the memorandum agreement signed?

A. New York City.

Q. Were you present when it was signed?

A. I was.

[fol. 82] Q. Did you then return to San Antonio, Texas?

A. Immediately.

Q. And that on August 31 you met with the supervisors of your plant?

A. Yes, sir.

Q. In your office here in San Antonio, Texas?

A. Yes, sir.

Q. Did you tell them that this memorandum agreement had been signed the day before?

A. I did.

Q. Did you tell them that they should encourage employees in the plant to sign authorization cards or any cards for the union?

A. I did.

Mr. Morris: Object. Move to strike. May I ask one voir dire question, Mr. Examiner, in connection with the objection?

Trial Examiner: Yes.

Voir dire.

By Mr. Morris:

Q. Was any representative of the Union present at this meeting, Mr. Simon?

A. No.

Mr. Morris: Move to strike as hearsay as to the Respondent Union.

Trial Examiner: Well, again, this is one of those con- [fol. 83] solidated cases where that question very often arises. Obviously it can't very well be held against the union if no union representative were present, but you are forgetting there is a case here against the Company, and he was called under 43b not as a representative of the Union but as a representative for the Company. And obviously if no union person were present, if there is not some other proof, this matter could run only against the Company, anyway.

I think it's very clear from the nature of his testimony that it would be hearsay as relates to the Union, at least so far as explained, any finding I would make in which I held against the Union would be reversible error.

* * * * * * *

[fol. 84] By Mr. Sears:

Q. Mr. Simon, when you held the meeting in your office on August 31 with your supervisors, did you specifically ask them to go out in the various departments and try to get everyone in their departments to sign up with the Union?

A. I did.

Mr. Morris: My objection—may I have a continuing objection to this entire conversation?

Trial Examiner: Yes, if you wish, you may have a standing objection. It is overruled.

• • • • • • •

[fol. 85] By Mr. Sears:

Q. Mr. Simon, prior to the signing of the memorandum agreement in New York City, did the Union at any time submit authorization cards to you for your inspection?

A. They did not.

Q. Did they at any time in your presence submit authorization cards to any officer, agent or representative of the [fol. 86] Bernhard-Altmann Corporation?

A. They did not.

Q. Did they at any time state that they had authorization cards signed by employees of the San Antonio, Texas plant?

A. They did.

Q. Do you recall whether or not any representative of the Union made a statement as to the number of cards that they had signed by employees?

A. I have no recollection of it.

• • • • • • •

[fol. 87] Mr. Sears: That is true. But for this purpose we refer to General Counsel's Exhibit 5, which are persons paid on July 27, 1957 payroll but not appearing on the August 31, 1957 payroll; regardless of when these people were terminated, if they were terminated at all, according to Mr. Simon they would still be considered employees as of August 30. There are 118 names on this list.

General Counsel's Exhibit 4 is a list of the payroll record of August 31, 1957.

I am handing this to you now, Mr. Simon.

By Mr. Sears:

Q. I am asking you for what purpose were those names circled, that are circled on this list?

A. The names circled on this list indicate those employees outside of the unit.

Mr. Morris: I move to strike that as a conclusion.

[fol. 88] By Mr. Sears:

Q. Did you—

Mr. Morris: May I have a ruling?

Trial Examiner: Well, again this was not decided upon by any agreement between you and the Union, but it was your own opinion, is that it?

The Witness: Well, it was all with the Union's knowledge, sir.

Trial Examiner: You mean those circles were put on in the presence of a Union representative?

The Witness: No, but they knew those people for whom they weren't getting dues.

By Mr. Sears:

Q. Are these people clericals, plant clericals, watchmen and plant supervisors?

A. Yes, sir.

Trial Examiner: All right. I will deny the motion to strike.

Mr. Morris: May I have the witness on voir dire?

Trial Examiner: If you wish, yes.

Voir dire.

By Mr. Morris:

Q. Mr. Simon, isn't it a fact that the Union and the Company are still in dispute as to certain individuals, as to whether they are or are not in the unit?

A. Well, there are four people.

Q. At least?

A. Only four that there is any question as to their status, [fol. 89] where there may be a question as to their status.

Q. And that list that you have before you, that represents the Company's position as to who was in the unit, is that correct?

A. That's right.

Q. The Union has not agreed with you on all of those people, have they?

Trial Examiner: Well, as I gather, at least—there are at least four of them there? Are those four on that list?

The Witness: Those four have been circled.

• • • • • • •

[fol. 90] Q. Are the names which you circled—I ask you to again look at the exhibit—those names which you circled, did you circle them based on the exclusion previously covered in the terms of the contract as to those employees that were not in the unit under the contract?

A. Yes, sir.

Q. You did so to the best of your knowledge?

A. Definitely.

Q. And at this time, to the best of your knowledge, the only conflict that you have or disagreement that may exist concerns four people, the names of which you just gave us?

A. Yes, sir.

Q. Did you make a count of the number of people on that list, the payroll list of August 31, whose names were not circled?

A. Yes, sir, I did.

Q. Do you recall what that count is?

A. I think it's 288.

• • • • • • • •

[fol. 91] By Mr. Sears;

Q. Mr. Simon, I would like to once again call your attention back to the time on or about August 31, when you met with your supervisors in your office. Do you recall that? Please answer yes or no.

A. Yes, sir, I do.

Q. Mr. Simon, why did you call your supervisors into [fol. 92] your office?

Mr. Morris: Objection. Immaterial as to why. It would call for a conclusion.

Trial Examiner: No, I will permit the witness to answer. You may answer.

The Witness: Should I answer?

Trial Examiner: Yes.

A. We had signed a contract with the Union and had agreed with the Union that it was for the best interests of

all concerned that as many employees as possible be members of the Union.

By Mr. Sears:

Q. Did anyone representing the Union, an officer or agent of the Union, ask you to encourage the employees to join the union?

A. They did.

Trial Examiner: Well, that raises a point. Is there any reason why they should not? Is there anything illegal about that?

Mr. Morris: Practically everything that is alleged in the complaint is not illegal.

Trial Examiner: Well, I am asking General Counsel what his contention is.

Mr. Sears: I am showing here that there was a conspiracy between the—or at least an agreement between the Company and the Union that the Company would encourage [fol. 93] these employees. The Company did encourage these employees.

Mr. Morris: We will stipulate that there was—that the Union wanted the Company to encourage within their rights of free speech under the Act employees to become members of the Union without coercion, without promises of benefit.

We certainly would not stipulate that they actually did it, and I think the results show that they didn't do it, and there is nothing illegal, and this is completely immaterial to this proceeding.

Trial Examiner: Well, will you accept that stipulation, that they asked them to encourage—

Mr. Sears: Insofar as that—

Trial Examiner: I mean that takes care of the answer.

Mr. Sears: I will accept that.

Trial Examiner: It takes care of the question that you put to the witness.

All right.

* * * * * * * * *

[fol. 94]. Cross examination.

By Mr. Morris:

Q. I call your attention to the meeting you held with your supervisors, I believe it was on or about September 24, Mr. Simon. It's true, is it not, that you cautioned your supervisors not to threaten any employees in connection with their either joining or not joining the Union?

A. Yes.

Mr. Sears: May I make a correction there. You said September 24th. I believe the date was August 31, that was the first meeting with the supervisors.

By Mr. Morris:

Q. Is that your recollection, August 31?

A. Yes.

Q. And that is the meeting you are referring to?

A. Yes.

Q. That is the meeting where you say you cautioned your supervisors not to threaten any of the employees as to whether they joined or did not join the Union?

A. That's correct.

Q. And did you also make it clear to them that the employees did not have to join the Union?

A. I did.

Q. And did you tell the supervisors to so advise the employees?

A. I did.

Q. Have various employees from time to time asked you [fol. 95] whether or not they had to join the Union?

A. They have.

Q. And have you advised them that they did not have to?

A. Told them the choice was entirely up to them.

Q. Did any of them ask what would happen to them if they did not join?

A. Yes.

Q. And what reply did you give them?

Mr. Sears: Objection.

Mr. Morris: What grounds?

Mr. Sears: I would like to know who asked him.

Trial Examiner: No. I will permit the witness to answer.

By Mr. Morris:

Q. You may answer the question. What reply did you make?

A. Would you repeat your question, please?

Q. When employees asked what would happen to them if they did not join the Union, what reply did you give them?

A. Nothing would happen.

• • • • • • •

[fol. 96] Q. All right.

Call your attention to a statement on page 4 of the Answer which the Company filed in this case, again referring to your meeting with the supervisors, where it is stated, and I quote from your Answer, it was expressly stated that no one would be discriminated against in any form for refusing to join the Union.

State whether or not you so advised the employees. Excuse me. You so advised the supervisors.

A. I did.

Q. And you so advised them to tell the employees that they would not be discriminated against, is that correct?

A. That is.

• • • • • • •

[fol. 97] Call your attention now to your conference in New York at or about the time the memorandum agreement [fol. 98] was signed on August 30, this being in evidence as General Counsel's Exhibit 2. How long were you in New York at that time?

A. I went up on a Tuesday or Wednesday and left on the 30th, whatever day that was.

Mr. Chaikin: Friday.

A. Friday or Saturday.

By Mr. Morris:

Q. You weren't present during all of the conferences, were you?

A. No, sir.

Q. In fact, you did not come in until the last day of the conference, isn't that correct?

A. That's correct.

Q. The parties were meeting, however, all that week, practically on a daily basis?

A. Yes, sir.

Q. And by the time you came in on Friday there had been a meeting of the minds, had there not? The parties were in agreement, it was a matter of formalizing certain things?

A. Yes, sir, pretty formalized.

Q. So when you stated that you had no recollection of cards being presented or offered, you refer to the time you were present on Friday and you do not refer to any time the parties were present on Monday, Tuesday, Wednesday or Thursday, is that correct?

A. I wasn't asked for that. I was only asked in my presence.

[fol. 99] Q. That's right, you were asked about your presence.

A. That is all I answered to.

Q. And so your answer had reference only to the time you were present?

A. That's correct.

Q. All right. I just want the record to be clear on it.

You stated that there were four persons in dispute as to whether or not they were or were not within the contractual unit.

A. Yes, sir.

Q. You named David Gomez, Jesus Ayala, Mariano Zuniga and Manuel Ochoa.

Were there not several others, to-wit:

Anthony Plata? Wasn't there a dispute about Anthony Plata?

A. No, sir. Right now, the only questions that exist is a possible question of the full-fashion foremen.

Q. How about Alberto Moreno?

A. No, sir.

Q. Morin.

Horst Trenz?

A. No, sir.

Q. Are those persons in or out in your opinion?

A. They are in the unit—out of the unit. I beg your pardon. Out of the unit.

[fol. 100] Q. Doesn't the Union contend that they are in the unit?

A. No, sir.

Q. You are saying that those three persons, Plata, Morin and Trenz, are out of the unit?

A. Yes, sir.

Q. And that the union has agreed to that?

A. Yes, sir.

Q. Could you be mistaken in that?

A. I couldn't be mistaken, no, sir. My interpretation could very well, but I could not be mistaken.

Q. But your interpretation might be wrong?

A. I am quite sure that I am right.

Q. At any rate, there have been—

A. Can I make a statement, explain myself?

Trial Examiner: Well, are you willing?

Mr. Morris: Go ahead.

The Witness: Explain why I took that or made that conclusion.

At the present time we have a grievance, let me see, an unsolved or unconcluded grievance, regarding the status of these four men. There is no grievance existing regarding the status of any other employee in our organization.

By Mr. Morris:

Q. No formal grievance?

A. Right, that's right.

Q. But there have been discussions with regard to the [fol. 101] coverage of the contract, whether the contract covers some of these other people or does not cover some of these other people?

A. Not recently; no, sir.

Q. Well, there haven't been any recent conversations but all the disputes have not been resolved, isn't that correct?

A. I am not aware of any dispute existing today.

Trial Examiner: Well, isn't it sufficient his explanation of why he feels there is no dispute is there is no grievance

existing? Now, that may be reasonable of may not be a reasonable position.

By Mr. Morris:

Q. Would you accept the Trial Examiner's statement there, that the reason you feel—

A. I am only a subpoenaed witness, Mr. Morris.

Q. Don't be so modest, Mr. Simon. I am asking whether or not this is—if he correctly characterized your position, that is, that the reason you feel there are no further disputes is that there is a grievance on those four only, that is, Gomez, Ayala, Zuniga and Ochoa, is that correct?

A. You mean that's the only basis for my statement?

Trial Examiner: Well, isn't that the basis of why you say—

The Witness: Yes, sir.

Trial Examiner: Well, that would seem reasonable to me.

Mr. Morris: All right. I will accept that.

* * * * * * *

[fol. 102] Redirect examination.

By Mr. Sears:

Q Mr. Simon, while you were in New York during the last week in August of last year did anyone representing the Company have a conversation with you concerning whether or not the Union had offered or had supplied authorization cards signed by employees in the San Antonio, Texas plant?

* * * * * * *

A. No one discussed the subject with me.

* * * * * * *

[fol. 103] Recross examination.

By Mr. Morris:

Q. Mr. Simon, did you have with you copies of the Bernhard-Altmann Texas Corporation payroll when you were in New York the latter part of August 1957?

A. No, sir.

Q. Were there copies of such payroll in the New York office of the Company?

A. No, sir.

Q. You did, however, know the number of employees of [fol. 104] your Company at that time? I am not asking you what it was but I am asking you whether you had knowledge.

A. Now, I will have to qualify, I will have to explain my answer to this, so there will be no misunderstanding.

I sometime in the month of August, I believe it was the month of August, wrote a letter to New York in which I identified a head count of the number of employees, and outside of that, there is no other—have there been any other count of employees in New York.

Q. This was a letter sent during the strike, is that correct?

A. I am almost sure it was during the strike, I am almost sure it was.

Q. And you were reporting the number of payroll on strike and so forth, is that correct?

A. Yes, I believe that was the letter contained that information.

• • • • • • •

[fol. 105] Thomas Kovalski a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sears:

Q. Will you state your name, please?

A. Thomas Kovalski.

Q. Will you spell your last name, please?

A. K-o-v-a-l-s-k-i.

Q. Mr. Kovalski—

Mr. Sears: I request that I have this witness under 43(b).

[fol. 106] Mr. Morris: Mr. Examiner, I am not sure that this witness would qualify under 43(b).

Trial Examiner: Well, I think you better qualify him first. He wasn't previousy identified as a member of management, as I understood it. He may be a supervisor.

Mr. Sears: I will.

By Mr. Sears:

Q. Mr. Kovalski, will you state your occupation, please?

A. Production Manager of the Bernhard-Altmann Texas Corporation.

* * * * * * *

By Mr. Sears:

Q. Mr. Kovalski, I would like to call your attention to [fol. 107] a period of time around the end of August of 1957, specifically August 31. Do you recall that date?

A. Yes.

Q. On that date did you attend a meeting in the office of Mr. Richard Simon, Bernhard-Altmann Texas Corporation?

A. Yes.

Q. Do you recall who else was present at that meeting?

A. Well, Mr. Simon called together the supervisors and foremen and floorgirls at that meeting.

Q. Do you recall what was said by Mr. Simon at that meeting, if anything?

A. He said that the Company signed an agreement with the Union for a contract, Union contract. That we are a Union shop now.

Q. Did Mr. Simon tell you or ask you to urge employees in the various departments to join the Union?

A. Yes, he did.

Q. Did you do so?

A. Yes, I did.

* * * * * * *

[fol. 108] Redirect examination.

By Mr. Sears:

Q. Did the Company have any policy in regards to seniority prior to entering into the contract, to your knowledge, speaking of the contract of August 30th? If I may,

I would like to restrict this solely to the area of restoring seniority to people who had been laid off or fired.

Do you know of any policy concerning that?

A. Yes, we had restored people's seniority before the contract was recognized.

Q. Do you recall specifically in what manner this was restored? By this I mean if the individual was fired or laid off, was there any period of time beyond which his seniority was not restored, if he was rehired, to your knowledge?

A. I don't recall. I don't fully recall the seniority procedure at that time.

I am thinking about that, sir. Could I add this to your question:

That as far as seniority went, we had—we knew, Miss Stricklen and myself, had records and whenever the records showed that a person quit voluntarily or was fired, they lost their seniority. Now, whenever a person left because of illness, pregnancy, laid off due to lack of work, and it was—we would most of the time restore their seniority to [fol. 109] the first hiring date.

Q. Was this limited in any way upon rehiring within a period of time, to your knowledge?

A. No, I don't recall that it was a limit of time.

* * * * * * *

[fol. 110] COLLOQUY BETWEEN
TRIAL EXAMINER AND COUNSEL

Mr. Sears: Mr. Examiner, at the request of counsel for the General Counsel, this stipulation was agreed to by and between Mr. Morris as attorney for the Respondent Union and myself prior to the hearing and before Mr. Morris as attorney for the Respondent Union was apprised of certain allegations quoting Mr. Plecher in conversations with and about Julia C. Contreras and Minnie Escamilla, and such stipulation was agreed to also in lieu of a subpoena being issued by counsel for the General Counsel and calling Mr. Plecher from New York City.

We do not contend that any adverse inference be drawn by the absence of cross examination by counsel for Re-

spondent Union or that Respondent Union is bound by the testimony of Mr. Plecher contained in this stipulation.

I will now mark for identification the stipulation of testimony as GC-9.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Trial Examiner: And that may go in by agreement? That is the stipulation referred to in the oral remarks?

Mr. Sears: That is correct. I offer it in evidence as [fol. 111] GC-9.

Trial Examiner: It may go in, then, by agreement.

(The document heretofore marked General Counsel's Exhibit No. 9, for identification was received in evidence.)

Mr. Sears: May we go off the record for just one moment?

Trial Examiner: Yes. Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Sears: I have marked here a document as GC-10, a list of names and corresponding dates across from them. This list constitutes cards signed by individuals purporting to be employees of the Bernhard-Altmann Texas Corporation, the dates that such cards were signed, and in addition at the bottom of the fifth and last page there is added in handwriting the name of Guadalupe Balderma[illegible]th the notation that the Union's records kept in the regular course of business show a signature by the aforesaid individual on 8-8-57, and the card returned to her at her request on 9-24-57, and Mr. George Lambert, the business agent of the Respondent Union, would so testify.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

[fol. 112] Mr. Morris: Add to that would so testify that such card was in the possession of the Union for the period of time between those two dates and that it was returned on or about the date indicated.

Mr. Sears: I would like to further state that there are certain corrections made in ink as to several dates on the list, and that on the fifth and final page the name of Sira Ramirez should be stricken as it is a duplicate and is contained on the third page of the list.

Do you so agree, counsel?

Mr. Morris: Yes. It's my understanding that all of the inked interlineations and corrections are part of the stipulation. Is that correct?

Mr. Sears: That is correct.

Trial Examiner: Very well. Then it may be received, I gather, as General Counsel's Exhibit 10.

(The document heretofore marked General Counsel's Exhibit No. 10 for identification was received in evidence.)

Mr. Morris: It's my understanding that this stipulation concedes the validity of all the cards shown on this list as to authenticity without any party at this time waiving objections as to whether or not the persons who signed such cards were employees. Is that correct?

Mr. Sears: That is correct.

• • • • • • • •

[fol. 113] Mr. Morris: No objection. I think the record should reflect in view of the fact that there will not be any actual cards in evidence, that the General Counsel and all parties concede that the authorization form of those cards [fol. 114] is sufficient to meet the authorization requirements for represen ation under the Act.

Mr. Sears: I will so concede and agree.

Trial Examiner: All right. Thank you very much.

(The document heretofore marked General Counsel's Exhibit No. 8 for identification was withdrawn.)

• • • • • • • • •

[fol. 115] Mr. Sears: Mr. Examiner, General Counsel's Exhibit 10 has been altered by agreement between counsel for the Respondent Union and counsel for General Counsel by striking certain names from the list.

By stipulation between counsel this list now constitutes the names of all employees who signed union cards prior to October 10, 1957, and the date shown of such signing,

with the exception—oh, pardon me, strike with the exception.

This list does not include cards signed after October 10, 1957, nor does it include additional cards signed by any employee who signed other cards after the date shown.

This is with the exception of three individuals, Jessie Ayala, Manuel G. Ochoa and Mariano Zuniga.

The status of these three individuals is in dispute and it is my position as counsel for General Counsel that the aforesaid individuals are foremen and not in the unit. This position is opposed by counsel for Respondent Union and testimony will be presented in relation to the status of these individuals.

For the purpose of these proceedings it is agreed that all of the persons whose names appear on this list shall be considered as employees of the Respondent company as of [fol. 116] on or about August 30, 1957 and as of on or about October 10, 1957, and that they are within the units as described and set forth in the agreements in evidence as General Counsel's Exhibit 2 and 3.

Therefore, in addition the following individuals should be added to the present list of people considered also as employees of the company. I have a list of twelve names here. I am afraid that I am very poor at Spanish and I would probably mispronounce them quite a bit. I will hand them to—

Trial Examiner: Hand them to the reporter.

Mr. Sears: I will hand them to the reporter so that he may copy them.

Fernando Garza, Adelaide Gomez, Antonio Guerrero, Louisa Maldonado, Alice Ramirez, Mary Rivera, Mary Salinas, Adella Tober, Elvira Contreras, Catalina Rodriguez, David Gomez, Willie Voges.

Mr. Morris: Will you read that back, the names?

(Record read)

Mr. Sears: It is further stipulated and agreed by and between counsel for Respondent Union and counsel for General Counsel that General Counsel's Exhibit 3, an agreement between Respondent Union and Respondent Company, which shows upon its face a date of October 7th, shall be considered as executed in full as of on or about October

10th, since it appears that the execution by both parties was not completed until October 10th.

[fol. 117] Mr. Morris: We join in that entire stipulation.

We would want the stipulation to reflect, however, that there is no issue between the parties with regard to the employee status of Jessie Ayala, Manuel Ochoa and Mariano Zuniga. It is agreed that those persons were employees of the company on or about the August 30, 1957 date and on or about the October 10, 1957 date.

The only issue between the parties relates to whether or not these persons are within supervisory status or not.

Is that correct?

Mr. Sears: That is correct.

Trial Examiner: Well in the first place, thank you, counsel, for the stipulation. For my own clarification, now, these ten employees whose names have been read into the record—

Mr. Sears: Twelve.

Trial Examiner: Was it twelve?

Mr. Sears: Twelve.

Trial Examiner: You say should be added as employees of the company. To which list should that be added, 4 or 5? Neither of which actually are in evidence here.

Mr. Sears: They should be for all purposes added to number 4, I think would be the better way of adding them, since the one marked for identification as Number 5 is the list of people—

Trial Examiner: Working the last of September but not on August 31 is what 5 is.

[fol. 118] Mr. Sears: Oh, I beg your pardon.

Trial Examiner: According to the identification I have here, 4 was the list of employees paid and working on August 31.

Mr. Morris: I would suggest that they cannot be physically added to any of the lists, Mr. Examiner, because the lists purport to be something else. They simply have to be added on to the entire total.

Trial Examiner: Let me ask you this:

Don't you have somewhere or can't you draw up a single list of employees?

Mr. Sears: Well, 4 and 5 constitute two lists which contain the names of individuals, those names which are

uncircled that are considered to be within the unit covered by the contracts, and these people are considered to be employees of the company regardless of whether or not they did physical work and were paid.

Trial Examiner: Well, let me get at this, then. What you want this list of union card signers you just stipulated about—

Mr. Sears: Yes, sir.

Trial Examiner: —applied to General Counsel's Exhibit 4 and 5 plus the twelve names?

Mr. Sears: That is correct.

• • • • • • •

[fol. 119] Mr. Sears: At this time I would like to offer in evidence those documents marked for identification as GC-3, 4 and 5.

Trial Examiner: All right. Do you have any objection?

Mr. Morris: No objection. I have checked the payroll records and insofar as GC-4 and 5 reflect persons who were working for the company on the dates shown on the faces of GC-4 and GC-5, those documents appear to be correct and I raise no objection in terms of authenticity.

Trial Examiner: All right.

Mr. Sears: There are certain additions and corrections, made on GC-4 and GC-5, which have been initialed by Mr. Morris and myself.

Trial Examiner: All right, fine.

Then 3, 4 and 5 are now received.

(The documents heretofore marked General Counsel's Exhibits Nos. 3 through 5 for identification were received in evidence.)

• • • • • • •

[fol. 120] Mariano Zuniga a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Morris:

Q. Would you state your name, please?

A. Mariano Zuniga.

Q. And where are you employed?
A. Bernhard-Altmann.
Q. And how long have you worked there?
A. Seven years.
Q. And what is your job at Bernhard-Altmann?
A. Foreman.
Q. Foreman in what department?
[fol. 121] A. Knitting Department.
Q. Is that any particular part of that department? Is that Full-Fashion, Flat or what?
A. It's Full-Fashion.
Q. Full-Fashion Knitting.
And how many other employees work with you?
A. Oh, about thirteen, altogether, on my shift.
Q. Are you foreman of a certain shift?
A. Yes, sir.
Q. What shift is that?
A. It's the "B" shift.
Q. B shift.
Now, that shift will work at different times at different hours, is that correct?
A. Yes, sir.
Q. Is it true that normally the Full-Fashion Knitting machines and the Full-Fashion Knitting machine operators work around the clock? In other words, there are three shifts, is that correct?
A. Correct.
Q. And yours is the B shift and sometimes it will work day shift, sometimes graveyard, sometimes swing, is that correct?
A. Correct.
Q. Now, would you tell the Trial Examiner what you do during the day? What is your job? Just explain in your own words what your job is.
[fol. 122] A. Well, my job is fixing chains.
Q. Would you explain to the Examiner what you mean by chains, what are these chains?
A. That is for different styles and different orders.
Q. Let me see if I understand you.
For each style garment being knitted there is a different kind of chain, is that correct?
A. Yes, sir.

Q. You have to take these chains and make certain adjustments on them in order to have this chain when it's on the knitting machine produce the style that you are making, is that correct?

A. We change the size markings and sizes.

Q. Sizes and style, is that correct?

A. Yes, sir.

Q. Now, do you have any sheets which give you instructions on what changes are to be made in the chains?

A. We have some charts.

Q. Charts.

Do you prepare these charts or are they already prepared for you?

A. They are already prepared for me.

Q. They are prepared for you.

And your job, then, is to conform the chain to the chart for the style and size that is being produced, is that correct?

A. Correct.

[fol. 123] Q. Now, do you do that for all of the machines in your department?

A. For every one of them.

Q. That is, for all of the full-fashion knitters on the machines during your shift, is that correct?

A. Correct.

Q. And about how much of your time do you spend doing that kind of work during the day?

A. Well, for instance, like we have lots of small orders now, and make-ups and samples, so all of the time I am making some chains to be ready for it, fixing the chains up.

Q. Let me see if I understand you, Mr. Zuniga.

You have a lot of small orders and make-ups at the present time, is that right, and samples?

A. Correct.

Q. Samples, too?

A. Correct.

Q. Does that mean that there are more changes to be made?

A. Yes, sir.

Q. If a great many individual units were being produced of the same style in the same size, there would not have to be any significant changes in the chain, is that right?

A. No, sir.

Q. But when there are many styles, many sizes and many make-ups, you have to change it often, is that correct?

[fol. 124] A. That's correct.

Q. Is your testimony, then, that at the present time because of these many changes, you are spending most of your time making chains?

A. Yes, sir.

Q. Now, what else do you do besides make chains?

A. Well, contribute the work to the toppers.

Q. Contribute the work to the toppers. Would you explain that?

A. Well, for instance, if those toppers stay behind, well, I come along, put the machine on make-ups or samples to hold up the knitters.

Mr. Morris: Would you read that answer, please?

(Last answer read)

By Mr. Morris:

Q. Now, what do the toppers do? Would you explain to the Trial Examiner the work of the toppers so he will understand that?

A. Well, just top the cuffs.

Q. That is as meaning to you, Mr. Zuniga. Do they spread the cuffs on needles?

A. On needles, yes, sir.

Q. And this is an operation that co-ordinates with the knitting operation, is that correct?

A. Correct.

Q. You do that before the work is put on the knitting [fol. 125] machine, is that correct?

A. That is correct.

Q. So that you have to kind of keep the work flowing evenly between the toppers and the knitting machines?

A. Correct.

Q. And in order to do that you use the expression putting the knitting machines on make-up. What do you mean on make-up?

A. Well, if I set the machine for make-ups, they hold the knitters for making production, and that way the toppers get—they get caught up with their work.

Q. All right.

Now, when you take the work to the toppers how do you give it to them? Do you carry it to them?

A. Yes, sir.

Q. You carry it by hand, is that correct?

A. Yes, sir.

Q. And this is the way they get their work?

A. Correct.

Q. Now, do you sometimes operate the knitting machines, yourself?

A. Well, once in awhile when, for instance, if they can't find a knitter to come in Saturdays, well, they call me up so I run the samples or whatever they want me to do.

Q. In other words, you fill in on vacancies, is that correct?

A. Correct.

[fol. 126] Q. Is that true when someone is sick, too?

A. Well, no, I never did run a machine when somebody is sick.

Q. I see.

Have you ever had occasion when there was somebody sick and they could not get another knitter? What was done then? Did you ever run the machine?

A. I just let the machine stop there.

Q. You let the machine stop.

Now, to what extent do you tell the knitters and the toppers what to do? Just explain to the Examiner the extent to which you tell them what work they are to perform.

A. Well, what you mean about that?

Q. Well, do you tell them what work they are supposed to do?

A. Well, I have told them what order and what style to run.

Q. Now, where do you get this information about the orders and the styles?

A. Well, from Mr. Coveleski.

Q. Who is Mr. Coveleski?

A. Supervisor.

Q. He is the supervisor over the Knitting Department, is that correct?

A. Correct.

Q. Is Mr. Potts also a supervisor in that department?

A. Well, I understand he is a supervisor and the general mechanic.

[fol. 127] Q. Do you take orders from him, too?

A. Yes, sir.

Q. You take orders from both Mr. Coveleski and Mr. Potts?

A. Yes, sir.

Q. Now, who was the supervisor before Mr. Coveleski?

A. Mr. Andrew Gonzales.

Q. And do you remember when the change was made, when Mr. Coveleski became supervisor?

A. That was during the strike.

Q. Sometime during the strike?

A. Yes.

Q. Does Mr. Coveleski have the same jobs and duties, substantially the same thing as Mr. Gonzales used to do?

A. Just about the same thing.

Q. About the same.

Now, if a knitter has trouble with his machine or trouble with his chain while the chain is on the machine, does he fix it, himself? Does he call you over or a little of both, or just what happens?

A. The knitter calls me up.

Q. And what do you do?

A. Well, I just go ahead and fix the chain or whatever—whatever the trouble is.

Q. Now, this chain is necessary to the production of these sweaters, is that correct?

[fol. 128] A. That is correct.

Q. Now, what is your rate of pay?

A. $1.60.

Q. $1.60.

Do you know what the shop average is for the knitters?

A. Some of them $1.92. The highest average is on Mr. Amoros. He is $2.00 on an average.

Mr. Sears: May we go off the record for a moment?

Trial Examiner: Yes. Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Morris: It is stipulated by and between the parties that the full-fashion knitters for the fourth quarter of 1957 had an average earnings of $1.86 and a fraction cents per hour.

Trial Examiner: You join in that stipulation?

Mr. Sears: With the qualification that this is determined by piece rate, also.

Mr. Morris: We agree to that.

Trial Examiner: All right. Thank you very much.

Mr. Sears: For the purpose of the record, I would like the record to further show that I am not objecting to counsel's leading questions, and I will not object, but under the present circumstances I will refrain from doing so.

Trial Examiner: All right.

Mr. Morris: Well, I do not wish to be leading the witness. [fol. 129] I am trying to shorten the record and if I lead the witness in any prejudicial manner, I expect to be stopped.

Trial Examiner: All right. Well, if Mr. Sears doesn't, I will try to.

Mr. Morris: It is further stipulated by and between the parties that for the same period of time the average hourly earnings for the toppers was $1.94 and a fraction cents per hour.

Mr. Sears: And I further qualify that that they, too, are based on piece rates.

Mr. Morris: That is correct.

Trial Examiner: Very well. Thank you.

By Mr. Morris:

Q. Now, you actually give the work both to the toppers and to the full-fashion knitters, is that correct?

A. Yes, sir.

Q. Mr. Zuniga, has the company refused to pay you the five per cent provided for by the contract?

A. Yes, sir.

Q. Is your status in that five per cent part of an arbitration proceeding which is now pending?

A. Yes, sir.

Mr. Sears: Perhaps, counsel, you would stipulate that this grievance or arbitration proceeding was filed within the last three months or last two months.

Mr. Morris: I would stipulate whenever it was filed. I [fol. 130] don't think the filing time is material because the requested relief is for retroactive relief.

Mr. Sears: You say the company has refused to pay. I would like it to show that when was there a request for it to be paid.

Mr. Morris: I will be happy to stipulate that from the very first day it has been—always been the position of the union that these three knitting foremen were in effect leadmen and within the bargaining unit, and not supervisors within the meaning of the Act.

I don't think the company would contest that that was always the union's position, and I will so stipulate if you so care to.

Mr. Sears: I don't care to stipulate on that point, counsel.

Mr. Morris: Well, those are the facts and I can't stipulate otherwise.

Trial Examiner: All right.

By Mr. Morris:

Q. Did you participate in the strike?

A. Yes, sir.

Q. You went out on strike along with the knitters, is that correct?

A. Correct.

Q. I believe the record will show that you have signed a union card. You are a member of the union, are you not?

[fol. 131] A. I signed a union card.

Mr. Morris: May I have just a moment, please?

Trial Examiner: Yes, surely.

(Discussion off the record.)

Trial Examiner: Back on the record.

By Mr. Morris:

Q. Mr. Zuniga, do you spend a part of your time pulling cotton?

A. We have a cotton puller now. He stay behind, if I have time to help him out, well, I help him out.

Q. You say you have a cotton puller now. When did you get a cotton puller?

A. About two or three weeks.

Q. Two or three weeks ago?

A. Yes, sir.

Q. Before that did you do cotton pulling?

A. Topper used to do it.

Q. Did you help him?

A. Yes, sir, I helped him.

Q. That was part of your regular job to help on the cotton pulling?

A. Well, I don't know if it's part of my job or not. I did it.

Q. You did it, did you not?

A. Yes, sir.

Q. And did you do it regularly?

[fol. 132] A. Yes, sir.

Q. And did you do it regularly at times when neither Mr. Andrew Gonzales, Mr. Coveleski or Mr. Potts were present?

A. Yes, sir.

Mr. Sears: Mr. Morris, for the purpose of the record, cotton pulling, as you have described it, that is part of the knitting process that we are referring to now?

By Mr. Morris:

Q. Would you explain cotton pulling, what do you do with cotton pulling?

A. Well, we had different styles there, they are very hard to top, and one of the toppers—when the toppers stay behind on that kind of cuffs, they hire some cotton pullers so they can clean up the—take the cotton out so the knitters can transfer them on the machines.

Q. Let me see if I can help you explain this. The last few ribs are cotton, is that correct, and these are pulled off and not kept as part of the garment, is that correct?

A. That's correct.

Q. And this is the process of cotton pulling that you are talking about?

A. Correct.

Q. Do you spend part of your time measuring ribs, counting ribs?

A. Well, I do that on a new yarn and when I start up a new style, I have to measure those ribs.

[fol. 133] Q. Was this work formerly done by somebody else?

A. We used to have a girl there doing that kind of work.

Q. And that is now part of your job, is that correct?

A. That is part of my job.

Q. And how long has it been part of your job?

A. Well, since I started, I did it before, then they hired a girl, then they take the girl away and then I—I am doing it now.

Q. Were you doing it before the strike?

A. No, sir.

Q. They had a girl before the strike?

A. Yes, sir.

Q. Since the strike you have been doing it, is that correct?

A. Yes, sir.

Q. Or state whether or not you have been doing it.

A. I have been doing it.

Q. But even before this girl was hired to do the work you had done the work before she came, is that correct?

A. Correct.

Q. The matter of measuring and counting these ribs?

A. That is a part of my job, to do that.

Q. All right.

And state whether or not you also did that even when the girl was there doing it. Did you also do part of that work?

A. Correct.

[fol. 134] Q. State whether or not you also plyer the needles.

A. I do that.

Q. These are the needles on the topping bars?

A. Well, on the topping bars, the needles on the machine, too.

Q. On the machine.

It's necessary, is it not, to keep these needles straight at all times, is that correct?

A. Correct.

Q. And when a needle becomes bent it must be straightened out?

A. Correct.

Q. Or else it must be replaced, is that correct?

A. Correct.

Q. And is this part of your job?

A. Well, the knitter is supposed to plyer—that is part of the knitter's job, to—

Q. Do you also—

A. But if the knitter came to fix the—plyer the needle right, well, they call on me and not plyer the needle or change the needle.

Q. That is part of your job?

A. That is part of my job, too.

Q. Do you recall whether or not there was a girl at one time who had the job of plyering needles?

[fol. 135] A. Yes, we had a girl but they plyer those bars, toppers, for the toppers.

Q. And this is the same kind of work that you are now talking about, is that right?

A. Yes, sir.

Q. Now, state whether or not you have ever been told that you have authority to hire anybody.

A. No, sir.

Q. Is your answer that you have not been told?

A. I haven't been told.

Q. State whether or not you have ever been told that you have authority to fire anyone.

A. I never been told.

Q. What is your understanding with regard to your authority to hire or fire?

A. Oh, well, I was told by Mr. Andrew Gonzales whenever a knitter refuses to do something, well, I can lay them off for a couple of days.

Q. And do you know whether or not the knitter is supposed to report to Mr. Gonzales or to Mr. Coveleski—

A. Well—

Q. —if that happens?

A. If Mr. Gonzales wasn't there, well, I have to send the knitter to Mr. Gonzales next morning.

Q. And this is what Mr. Gonzales told you?

[fol. 136] A. Correct.

Q. And what then happens? Does Mr. Gonzales—I don't want to lead the witness. What happens when the knitter goes to Mr. Gonzales?

A. Well, I have never sent a knitter there, myself.

Q. Have you ever had occasion to lay off anybody?

A. No, sir.

Q. How long have you been in this position?

A. Well, for a couple of years.

Q. And during that time you have never laid off or had occasion to lay off anyone, is that correct?

A. I have never laid off no one.

Q. State whether or not you are supposed to lay off a person who refuses to do work if either Mr. Potts or Mr. Coveleski or Mr. Gonzales, anyone who is there, is present in the factory at the time.

A. Well, I send them to Mr. Potts or Mr. Coveleski first.

Q. State whether or not there are some times when they are not in the factory and you may be working with your shift without the presence of either Mr. Potts or the supervisor, either Mr. Gonzales or Mr. Coveleski, is that correct? Do you understand my question?

A. I didn't understand it very well.

Q. All I am saying is are there times such as on one of these graveyard shifts that neither Mr. Potts nor Mr. [fol. 137] Coveleski, nor Mr. Gonzales before Mr. Coveleski, are present? Do you understand?

Mr. Morris: If I may be permitted just to lead the witness, this is not a point in dispute.

By Mr. Morris:

Q. There are times when there are none of these supervisors present when your shift is working, is that right?

A. Correct.

Q. And that may be the graveyard shift, is that right?

A. Correct.

Q. At that time if a knitter refuses to perform work, what are you supposed to do, as you understand it?

A. Send them home, and then come and talk next morning to Mr. Coveleski or Mr. Potts.

Q. All right.

Suppose you are working a day shift or any shift when either Mr. Potts is there or Mr. Coveleski is there and this would be also true before Mr. Coveleski came there and Mr. Gonzales was there, what are you supposed to do then if a knitter refuses to work?

A. Well, I tell the knitter to talk to Mr. Potts or I go and tell Mr. Potts about it.

Q. All right.

State whether or not you have authority to send a knitter home as you have just testified about for anything, any [fol. 138] other reason, other than their refusal to do the work which is assigned to them. Do you have authority to send him home for any other reason?

A. Well, if there is no work on the machine, well, I can send a man home.

Q. Well, this is not for discipline, though, is it?

A. No, just—

Q. Because there is no work?

A. Lack of work.

Q. I see. Are you paid on an hourly basis? Are you paid just for the time you work?

A. Just for the time I work.

Q. You do not receive a salary, is that correct?

A. No, just by the time card.

Q. Just by the time card. You punch a time card?

A. Correct.

Q. Now, I want to be sure the record is clear here. You can send a man home if there is no work and you can send a man home if a supervisor is not present, and the man refuses to perform work. Is there any other reason when you could send a man home that you have been advised?

A. No.

Q. Your answer is no, is that correct?

A. Correct.

Q. Have you ever recommended that a person be fired?

[fol. 139] A. No, sir.

Q. Do you know whether or not you have authority to recommend that someone be fired?

A. No, sir.

Q. Have you ever been advised that you had that authority?

A. No, sir.

Q. I call your attention now to the month after the strike. State whether or not you attended any supervisors meeting called by the company for the purpose of advising the supervisors that the union and the company had signed a memorandum and that the supervisors were being urged to encourage employees to join the union. Did you attend any such meeting called by the company?

A. No, sir.

Q. Were you invited to attend any such meeting?

A. No, sir.

Mr. Sears: Was he working?

By Mr. Morris:

Q. Were you working during the month of September?

A. Yes, sir.

* * * * * * *

[fol. 140] Mr. Morris: Before proceeding with this next witness, we have one further stipulation, that is, that it is stipulated by and between the parties that if called to testify, Jessie Ayala and Manuel Ochoa would testify substantially the same both on direct and cross as the witness Mariano Zuniga, inasmuch as those are the two other foremen on the two other shifts referred to in this record.

Trial Examiner: You join in that stipulation?

Mr. Sears: I join in the stipulation.

Trial Examiner: Very well. Thank you.

Mr. Morris: There is just this qualification, that the witness, Jessie Ayala, would further testify that his wage rate is $1.45 per hour, whereas the wage rate for Mariano Zuniga and Manuel Ochoa is $1.60 per hour.

Trial Examiner: Will you accept that?

Mr. Sears: So stipulate.

* * * * * * *

[fol. 141] MRS. IRENE HERNANDEZ a witness called by and on behalf of Respondent Union, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Morris:

Q. Would you state your name, please?

A. Mrs. Irene Hernandez.

Q. Mrs. Hernandez, where are you employed?

A. I am not employed at the present.

Q. Were you formerly employed at the Bernhard-Altmann Company?

A. Yes, sir.

Q. Were you employed there during the month of September 1957?

A. Yes, sir.

Q. Call attention to the fact that the record shows that you signed a union card on September 24, 1957. I have reference to General Counsel's Exhibit 10.

Do you recall signing a card?

A. Yes.

Q. Would you tell us where you were when you signed that card?

A. At the cafeteria.

Q. And who was present?

A. The whole first department was present there.

Q. And who gave you the card to sign?

A. Jessie Ayala.

Q. State whether or not you signed that card voluntarily.

A. Yes, I did.

[fol. 142] Q. State whether or not you had been advised that you did not have to sign a card in order to work at Bernhard-Altmann.

A. Yes, I had.

Q. State whether or not you had been advised that you would receive the same benefits, whether you signed a union card or did not sign a union card.

A. Yes.

Q. State whether or not anyone told you that you had to sign a union card.

A. Nobody told me I had to sign a card.

Q. Would you state the reason why you signed a union card, Mrs. Hernandez?

Trial Examiner: Well—

A. Because I wanted to be a member of the union.

Trial Examiner: All right.

By Mr. Morris:

Q. State whether or not you would have signed a union card even if the company had not signed a memorandum agreement with the union a few weeks before you signed your card.

Mr. Sears: Objection.

Trial Examiner: Well, I will sustain the objection. That is speculative, certainly.

Mr. Morris: Note our exception.

Trial Examiner: Well, if you want to ask her whether or not she had previously signed any other union card, I [fol. 143] would permit that, but this is so speculative that I will sustain the objection.

By Mr. Morris:

Q. Now, you didn't go to work until after the strike, did you?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. In other words, you weren't even on strike, is that correct?

A. No.

Q. And you weren't working during the time?

A. I wasn't working there at that time.

Q. State whether or not you signed your card shortly after you became an employee.

A. Yes, I did, the next day.

Mr. Morris: That is all.

* * * * * * *

[fol. 144] VICTORIA GONZALES a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Morris:

Q. Would you state your name, please?
A. Victoria Gonzales.
Q. And where do you work?
A. Bernhard-Altmann.
Q. And were you working there in the month of September?
A. Yes, sir.
Q. 1957?
A. Yes, sir.
Q. The record shows that you signed a union card on September 18th.
A. That's right.
Q. Is that correct?
A. Yes, sir.
Q. Do you remember where you were when you signed that card?
A. In the plant.
Q. And do you remember who gave you the card?
[fol. 145] A. Yes.
Q. Who?
A. Frances Cantu.
Q. Do you know whether or not she was a representative of the union or had any position in the union?
A. I think she did. She had the card and gave it to me. I asked her for it.
Q. You asked her for it?
A. Yes, sir.
Q. Now, do you know whether or not she was a union committee-woman?
A. I think she was.
Q. Did she ask you to sign or did you ask her for the card?
A. I asked her for the card.

Q. State whether or not you signed the card voluntarily.
A. That's right.
Q. Who was your floor lady at that time?
A. Margaret Gonzales.
Q. State whether or not she ever passed out any cards to people in her department.
A. Not that I know of, sir.
Q. Were you working there—
A. Yes, sir.
Q. —all during September?
A. Yes, sir.
[fol. 146] Q. And did she ever say anything to you or to others in your department in your presence—
A. No, sir.
Q. —about signing a card?
A. No, sir, not a word.
Q. Did she ever say anything one way or the other?
A. One way or the other, no, sir.
Q. State whether or not you had been advised that you would get the same benefits whether you signed a card or did not sign a card.
A. Yes, sir, we had been advised that.

* * * * * * *

[fol. 147] Q. State whether or not you were promised any benefits if you signed a card.
A. Yes, the same as if we would be in the union or non-union, we would get the same.
Q. And who told you that?
A. Mr. Simon gave us a speech.
Q. And he told you that in the speech?
A. Yes.
Q. State whether or not you signed the card voluntarily.
A. That's right.

Mr. Morris: I believe that is all.

* * * * * * *

[fol. 148] PAULITA BELTRAN a witness called by and on behalf of Respondent Union, being first duly sworn, was [fol. 149] examined and testified as follows:

Direct examination.

By Mr. Morris:

Q. Would you state your name, please?
A. Paulita Beltran.
Q. Is that Mrs. or Miss?
A. Miss—Mrs.
Q. Mrs. Beltran, the record shows that you signed a union card on September 1st, 1957. Do you recall that?
A. Yes, sir.
Q. Excuse me, October 1st. October 1st.
You do recall signing the card, do you not?
A. Yes, sir, I do.
Q. And do you recall now that it was October 1st or—
A. Yes, I do.
Q. Or about that time. I am not asking you for the exact date.
A. Yes, sir.
Q. And where were you when you signed that card?
A. At home.
Q. At home?
A. Yes, sir.
Q. And how did you happen to be signing the card at home? Who presented it to you?
A. Well, a young man and his wife. She went over, you know.
Q. Were they representatives of the union?
[fol. 150] A. Yes, sir, I am sure they were.
Q. And do you recall whether or not his name was Jerry Levine?
A. Yes, sir, that is his name.
Q. He and his wife came over, is that correct?
A. Yes, sir.
Q. And state whether or not you were promised any benefits if you signed a union card?
A. No, sir.

Q. State whether or not you had been advised that you did not have to sign a card if you did not want to.

A. Yes, that's right.

Q. State whether or not you understood that you would get the same benefits and that you had been so told, whether you signed a card or did not sign a card?

A. Yes, I did.

Q. State whether or not you signed your card voluntarily?

A. Yes, sir, I did.

• • • • • • •

[fol. 151] Mr. Morris: Mr. Examiner, as the result of an off the record discussion counsel for the General Counsel and myself have arrived at a stipulation as follows:

That counsel for the Respondent Union has made diligent effort to locate the employees shown on General Counsel's Exhibit 10 who have signed a union card on or after August 31, 1957. And this search has been directed at all such persons, and that we have located a substantial number of such persons, and that the parties stipulate that if called to testify each of these persons would testify substantially as the preceding three witnesses, with the exception that some of them would testify that they did hear one or more speeches by Mr. Chaikin during the month of September 1957.

[fol. 152] Mr. Sears: So stipulate.

Trial Examiner: Very well. Thank you very much.

I think in order to protect both counsel on this point, the record may reflect it, but I think perhaps the Trial Examiner should say that he assumes that the reason this stipulation has been entered into is because the Trial Examiner indicated that any more oral testimony on this point would be in my opinion cumulative.

Mr. Sears: That is correct.

Mr. Morris: That is correct. We have here in the courtroom a number of these witnesses present now. We have arranged for an interpreter for some of them, and we had an additional list to call for a later time.

Trial Examiner: Well, I appreciate very much you entering into this stipulation, and I think it will shorten the hearing somewhat.

• • • • • • •

[fol. 153] Mr. Morris: It is further stipulated by and between the parties that the strike which has been referred to in the record as having begun on July 29th and lasting until on or about August 30, 1957, was in protest of a wage reduction of employees of the Topping Department.

Mr. Sears: So stipulate.

• • • • • • •

[fol. 154] Mr. Morris: It is further stipulated by and between the parties that during the period preceding the strike and during the strike there was in effect a policy in the Looping Department whereby persons hired for the work of looping were hired as trainees and retained on probationary non-permanent employee status for a three-month period. At the completion of such period they were considered to be permanent employees.

May we go off the record for a moment again?

Trial Examiner: Yes. Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Morris: This stipulation has reference to the following named individuals:

Josephine G. Valencia, hire date 6-17-57; Mary Cora Medina, hire date 7-29-57; Blanch A. Martinez, hire date 6-17-57; Lupe F. Hernandez, hire date 7-29-57; Mary L. Hernandez, hire date 6-17-57; Eudelia Galindo, hire date 6-17-57; and Hermelinda L. Carrillo, hire date 8-1-57.

That completes the stipulation.

Trial Examiner: Do you join in that?

Mr. Sears: So join.

Trial Examiner: All right. Thank you very much.

Does that complete your stipulation?

Mr. Morris: Yes, it does.

Trial Examiner: Well, now, for my enlightenment, I [fol. 155] think probably at this point in the record what is your contention as to this last stipulation?

Mr. Morris: That—

Trial Examiner: Is it your claim that these individuals either should or should not be counted?

Mr. Morris: Should not be counted on certain dates and should be counted on other dates, depending on whether or

not they had completed the three-month period. This will show on the record so that for purposes of the first date they should not be counted. For purposes of the second date they should if they were sti" on the payroll.

Trial Examiner: All right.

Mr. Sears: I believe that all of them should not be counted on the period of time concerning the August 30th and three of the seven should not be counted concerning any other date.

• • • • • • •

[fol. 156] Sol C. Chaikin recalled as a witness by and on behalf of the Respondent Union, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

Mr. Morris: I am not sure whether or not this is in the record. Forgive us if it is repetitious, Mr. Examiner.

By Mr. Morris:

Q. Would you state your position with the International Ladies' Garment Workers' Union, please?

A. I am the Director of the Lower Southwest Region of the ILGWU.

Q. Which includes the City of San Antonio?

A. It does.

Q. Shortly before August 30, 1957, did you have occasion to be in New York City?

A. I did.

Q. What was the nature of your business there?

A. I was requested to come to New York City for a conference with the president of our International on Monday.

Q. Do you know the date?

A. I believe it was Monday, the 26th of August.

Mr. Sears: We will say Monday, regardless. If it was the 25th, 26th or 27th, it was on or about that period of time. It's perfectly all right with me, counsel.

Mr. Morris: I will accept that. O.K.

[fol. 157] By Mr. Morris:

Q. State whether or not any of the employees of the Bernhard-Altmann Company also went to New York at or about the same time.

A. Two employees of the company arrived in New York City on Sunday night, the 25th of August.

Q. And what were their names?

A. Jessie Ayala and Jaime Juarez.

Q. Do you know whether or not they had in their possession any signed authorization cards?

A. Yes, they did.

Q. Did you see these cards when they arrived?

A. I certainly did.

Q. State whether or not you were apprised during your stay in New York that additional cards had been signed?

A. I was.

Q. You were in telephone communication with San Antonio, is that correct?

A. Twice a day.

Q. Do you know what disposition was made of these cards that were in the possession of Mr. Ayala and Jaime Juarez?

A. I do.

Q. Were you present with them in connection with the disposition of these cards?

A. I was.

Q. What was done with them?

[fol. 158] A. They were turned over to our General Counsel, Morris Glushien.

Q. Morris Glushien, he is the General Counsel for the Ladies' Garment Workers' Union?

A. He is.

Q. Was he participating in the discussions held in New York at this time?

A. Completely.

Q. Do you know how long he had the cards in his possession or at least—strike that—do you know approximately how long after the cards were turned over to him that he returned the cards to the Texas representative?

A. Several days, at least.

Q. All right.

A. Full days and nights.

Q. All right.

Do you know whether or not Mr. Glushien met with the company attorney during that week?

A. He certainly did.

Q. What is the company attorney's name?

A. Mr. Leo Guzik.

Q. Were those meetings all in the presence of the other representatives of the company and the union or were there separate meetings between the attorneys by themselves?

Mr. Sears: I object. Show whether or not he was present [fol. 159] or not at any meetings.

By Mr. Morris:

Q. Were you present at any meeting when both attorneys were present?

A. I was.

Q. What was the physical layout of these conference rooms? Would you describe that for us?

A. Well, conferences were held in two suites, in each of two suites, and at one time or another, and moved back and forth. One suite belonged to the Executive Vice-President of our union, Louis Stulberg. The other suite of rooms belonged to President David Dubinski.

Q. Were conferences held in both of these suites?

A. At one time or another, yes. And sometimes simultaneously.

Q. State whether or not it was reported to the persons present at these conferences, being both the union representatives and the company representatives, that Mr. Guzik and Mr. Glushien had been in consultation with each other separately.

A. It was reported to both and to me several times.

Q. All right.

At or about that time had you made any determination as to the number of employees working in production and shipping for the Bernhard-Altmann Company in San Antonio?

A. I had made a determination, yes.

Q. Had you compared such determination with the cards that you have previously referred to?

[fol. 160] A. Almost every day.

Q. State whether or not such determination indicated that there was a majority of signed authorization cards among those employees.

A. During that week we became certain of the fact that we had a majority of signed cards.

Q. This was based on a comparison of these determinations?

A. Certainly that and other information.

Q. Had the company advised you at any time of the approximate number of employees at its San Antonio plant in the shipping and production departments?

A. They had advised us on at least two occasions of the number of people whom they had determined would be working for them or eligible to join the union.

Q. Did your determination of majority indicate a majority of that number which the company advised you?

A. It did.

Q. State whether or not at any time you requested the company, you or anyone in your presence, on behalf of the union, requested the company to extend recognition and bargaining before you had made this determination that you had a majority.

A. Not prior to that time.

Q. In your official capacity as Regional Director would you have been advised had such request been made?

A. Oh, absolutely.

[fol. 161] Q. I now call your attention to the period of time between the signing of the memorandum agreement in evidence as General Counsel's Exhibit 2—

Mr. Sears: You are referring to the memorandum agreement, counsel?

Mr. Morris: Yes.

Mr. Sears: That is General Counsel's Exhibit 2.

By Mr. Morris:

Q. Call your attention to the time between the signing of that memorandum on or about August 30, 1957, and the collective bargaining contract executed on or about October 10, 1957, in evidence as General Counsel's Exhibit 3.

State whether or not during that period of time there were various discussions with regard to the inclusions and exclusions in the bargaining unit to be written into the contract later executed as General Counsel's Exhibit 4. 3, excuse me.

Mr. Sears: 3.

A. I would say there were many conversations and each of them very lengthy concerning individuals and/or job classifications which should or should not be covered by a subsequent collective bargaining agreement.

By Mr. Morris:

Q. Now, as a result of those conversations state whether or not the language embodied in—

Mr. Morris: Where is the contract?

Mr. Sears: Which one?

Mr. Morris: Where is the contract?

[fol. 162] Trial Examiner: 3 is what he is looking for.

Mr. Sears: By the way, I object to your question. The contracts speak for themselves as to what language is included in there, as to what covers the unit, who is covered, and who isn't.

Mr. Morris: I haven't finished the question yet.

Trial Examiner: Oh, I would have stopped him if he had.

Mr. Morris: That wasn't my question.

Read me my question.

(Record read)

By Mr. Morris (Continuing):

Q. —Article 2 of the contract in evidence as GC-3 represents the final agreement of the parties with regard to the description of the unit.

Mr. Sears: I object to that question. The contract was executed on or about October 10th. It's presumed to be the final agreement between the parties as to what the contract covers.

Trial Examiner: No, this is permissible, whether or not there was a final one, whether or not there was any sub-

sequent one. Might well be followed up here, but this is permissible.

The Witness: Would you repeat the question?

Mr. Morris: Would you read the question, please?

(Last question read)

A. I would say that insofar as listing inclusions and exclusions, that the list is the final agreement, but when we [fol. 163] try to place individuals in the various classifications, we to this date have no final agreement on—

By Mr. Morris:

Q. Let me see if I understand your answer. In terms of description of a unit that was the final agreement of the parties, is that right?

A. That's right.

Q. Had there been continued conversations representing disputes between the company and the union with regard to the inclusion of specific job classifications or employees in certain job classifications?

A. So far as pinpointing specific employees as to whether they should be covered by this agreement or not covered by this agreement, there is disagreement up to this minute regarding a number of employees.

Q. You know as to how many employees?

A. Sometimes six and sometimes seven or eight, depending on the expansion of the work load in various departments.

Q. Have there been periods of time when the dispute as to inclusions was greater than your six or eight that you mentioned?

A. Oh, at one time I think we were disputing 30 or 40 people.

Q. I now call your attention again to your conferences in New York City immediately prior to the signing of the memorandum agreement of August 30th. Was there any discussion at such conferences with regard to any of the persons whom the company had hired during the strike?

[fol. 164] A. Yes, there was.

Q. Would you tell us what conversations occurred and with whom?

A. Apparently there was an agreement as to the contents of the memorandum and while they were being typed up Mr. Guzik and Mr. Altmann asked about procedures for the strikers to return to work.

Q. Let me interrupt you at this point and ask you to identify Mr. Altmann.

A. Mr. Hans Altmann, son of Bernhard Altmann, a major stockholder of apparently all of the Altmann Corporations, represented to us as the Executive Vice-President of Bernhard-Altmann Texas Corporation, or a leading officer of the Bernhard-Altmann Texas Corporation.

Q. All right. Please continue.

A. The company indicated or these representatives indicated that they had suffered greatly in loss of production during the period of the strike, that it would be to the interest of everyone concerned if everybody could get back to work as quickly as possible, that there might be some problems involved in getting everybody back to work because there wasn't enough of a backlog so that all of the loopers who were out on strike could be readily re-employed, and that it might be necessary for these strikers to remain unemployed for a short period of time, and they asked first whether we wouldn't accept the situation like [fol. 165] that because the girls would be eligible for unemployment insurance, and the loopers who were then currently working were only working part time so that there would be little economic loss for the girls who were out as against the girls who were in.

We accepted their explanation of the situation and agreed that those loopers for whom they had no work would remain unemployed until called back.

Secondly, they proposed that in order to get as much work knit as could be possibly knit, they proposed to us that we should agree that the Full-Fashion Knitting Department should run seven days a week, twenty-four hours a day, because in that manner they could work each shift six hours a day and have four shifts running and keep everybody at work.

When I said that I didn't know about the advisability of going into that, that if our knitters came back to work they would expect to work eight hours a day, three shifts,

and that this would cause a dislocation, Mr. Altmann and Mr. Guzik said that the men who were already in the plant were temporary employees at best, that it should not be a matter of concern to me, that if the union would agree to work four shifts six hours a day, seven days a week, with the further provision that the clause calling for time and a half for all Sunday work, that if that clause were suspended, that the company was prepared to go ahead and work this entire group to get as much knitting into the [fol. 166] process, into the production process, so that everybody could be re-employed as quickly as possible and begin earning as much money as they possibly could.

On that representation and because we had apparently made peace, we agreed that we would co-operate to that extent and as a result waived the provision of time and a half, and I represented myself as being fully prepared to go back to San Antonio and to convince the Full-Fashion Knitters who were on strike to accept that situation of a seven-day week, six-hour a day work load.

Q. All right.

Now, these employees that were referred to as temporary at best, you stated the employees in the plant. Was it made clear which employees in the plant Mr. Altmann or Mr. Guzik was referring to?

A. Oh, it was perfectly clear that he meant employees hired at or around July 29th and past that date.

Q. That was the date the strike started?

A. That's right.

* * * * * * *

[fol. 167] Mr. Sears: I will be glad to stipulate with counsel that there was an area or situation of antipathy between the company and the union prior to the entrance of the memorandum agreement.

* * * * * * *

[fol. 168] Trial Examiner: If you will add to the stipulation that you made the words "and the employees were aware of it."

Mr. Sears: And the employees were aware of it is sufficient.

Trial Examiner: I think that will take care of it.

Mr. Morris: We will accept that stipulation.
Mr. Sears: I so stipulate.

* * * * * * *

[fol. 169] Mr. Morris: It is stipulated by and between the [fol. 170] parties as follows:

That the names listed here and below appear on the payroll records of the company, and according to the individual payroll sheets for such employees as contained in the Bernhard-Altmann payroll ledger for the year 1957, such record reflects that the employees named last worked for the company on the date shown following the name for each such person.

There are three exceptions to this general form for each of the named persons. Those exceptions are specifically as follows:

Concepcion O. Riojas, shows last to have worked week ending February 9, 1957, but a returned date week ending October 25, 1957, the record reflecting that between those two pay periods the employee did not work for the company.

Likewise as to Luz Garcia, this employee was not employed between pay period ending August 24, 1957, and pay period ending October 19, 1957, and likewise for Olga Z. Morales, not employed between pay period ending September 14, 1957, and pay period ending December 13, 1957.

As to all of the other employees listed below the form heretofore set out shall be followed.

Trial Examiner: All right.
Mr. Sears: I so stipulate.
Trial Examiner: Very well. Thank you very much.
Mr. Morris: Carlota Sanchez, 8-3-57.
[fol. 171] Helen Martinez, 8-24-57.
Janie A. Salazar, 8-17-57.
Eugene Wilson, 8-24-57.
Ruben Davila, Jr., 8-3-57.
Bernard Kovalski, 8-31-57.
James R. Clark, 8-31-57.
Petra Castillo, 8-3-57.
Joe Lopez, 8-17-57.
Michael Chapa, Jr., 8-10-57.

Benito Saenz, 8-24-57.
Howard Hufft (Hoffa), 9-5-57.
Margaret G. Barrientes, 9-7-57.
Juan Cantu, Jr., 9-7-57.
Caralina J. Carreon, 10-5-57.
Hermelinda L. Carrillo, 8-31-57.
Estella Faz, 8-1-57.
Leilani Flores, 9-14-57.
Anita Franco, 9-21-57.
Petra C. Galindo, 10-5-57.
Estela M. Garcia, 9-7-57.
Maggie M. Harris, 9-21-57.
Mary L. Hernandez, 9-21-57.
Antonia L. Ledesma, 9-14-57.
William P. Letcher, 9-21-57.
Selestine Lopez, 9-7-57.
[fol. 172] Luisa Mares, 9-28-57.
Wayne D. Martin, 8-31-57.
Blanche A. Martinez, 9-14-57.
Mary C. Martinez, 9-14-57.
Petra Martinez, 7-27-57.
Alicia S. Munoz, 10-19-57.
Robert L. Phelps, 8-31-57.
Roque P. Ruiz, 10-5-57.
Frank Samudio, 9-7-57.
Edelia V. Sanchez, 9-7-57.
Josephine G. Valencia, 9-14-57.
Eudelia Galindo, 9-14-57.
John S. Torres, 9-14-57.

* * * * * * *

RICHARD SIMON recalled as a witness by and on behalf of General Counsel, having been previously duly sworn, was examined and testified further as follows:

[fol. 173] Direct examination.

By Mr. Sears:

Q. Mr. Simon, I believe there has been testimony in the record and I also believe it's been agreed that there was a strike last summer at your plant, is that correct?

A. Yes, sir.

Q. During that period of time, which there was a strike, did the company hire any new employees?

A. Yes, sir.

Q. Approximately how many, to your knowledge, were hired?

A. Oh, I think about 25.

• • • • • • •

[fol. 174] Cross examination.

By Mr. Morris:

Q. Call your attention to the matter of the last stipula-
[fol. 175] tion which reflects that your payroll record shows that Mr. John Clark, whom you referred to, James Clark, excuse me, last v rked for the company the payroll week ending 8-31-57.

A. Yes, sir.

Q. He has not since ever worked for the company, is that correct?

A. No, sir.

Q. Beg pardon?

A. No, sir.

Q. Your answer is he has not?

A. No.

Q. Nor—

A. He quit.

Q. He quit?

A. Yes, sir.

Q. He quit, then, on or about the date shown on his record in the last stipulation, is that correct?

A. That's correct.

Mr. Morris: Just a moment.

By Mr. Morris:

Q. Around the end of last year, either in December or January, the company presented a seniority list to the union, did it not?

A. Yes, sir.

Q. This seniority list did not contain the names of the replacements hired during the strike, did it?

[fol. 176] A. I don't think so.

Q. Beg your pardon?
A. I don't think so.
Q. Can you be sure of your testimony?
A. I am almost sure of it.
Q. Your testimony is that it did not?
A. Yes.

• • • • • • •

[fol. 177] BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 2

Memorandum of understanding between The Bernhard Altmann Texas Corporation and Local 590, ILGWU

1. The present strike is immediately terminated.

2. The Union represents that it has been designated as bargaining representative by a majority of the employees of the production and shipping employees; and the employer recognizes the Union as the exclusive bargaining agent for all production and shipping employees.

3. Striking employees shall return to work as soon as work is available for them, without discrimination.

4. Plant minimum shall be $1.10 per hour after 60 days employment.

5. Effective September 3, 1957 all wages shall be increased by 5%.

6. There shall be 3 paid holidays—Labor Day, Christmas Day, and Fiesta Day. However, during 1957, Thanksgiving Day is substituted for Labor Day.

7. There shall be one week's paid vacation after one year of employment and two weeks' paid vacation after 5 years of employment. Vacation pay shall be based on average earnings.

8. Hereafter the employer shall pay 50% of the hospital and surgical plan and the employee shall pay 50%.

9. The employer shall contribute 1¼% of its total payroll within the unit to the Union Health Center.

10. The employer will institute a check-off system for union dues.

[fol. 178] 11. Employees shall be entitled to 4 hours pay when called in to work.

12. There shall be a trial period of 60 days.

13. Piece rates shall be fixed by the employer subject to review by the union.

14. Sunday work shall be at time and a half. However, to assist the firm in its present emergency, Sunday work shall be at straight time rates until December 31, 1957.

15. Union may review piece rates for toppers prior to October 1, 1957 with arbitration in event of disagreement.

16. There will be a system of seniority by departments.

17. There shall be no strikes or lockouts during the term of the agreement.

18. Arbitration of all disputes.

19. Agreement shall run until December 31, 1959.

Formal agreement containing these terms to be promptly drafted by the attorneys and signed by both parties within the next two weeks.

DATED New York, N. Y.
August 30, 1957

BERNHARD ALTMANN TEXAS CORPORATION

By: Wolf H. H. Plecher

LOCAL NO. 590 INTERNATIONAL LADIES GARMENT WORKERS' UNION

By: Louis Stulberg

[fol. 179] BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 3

THIS AGREEMENT MADE AND ENTERED INTO THIS 12 day of OCTOBER, by and between BERNHARD ALTMANN TEXAS CORPORATION, with its place of business at SAN ANTONIO, TEXAS, and its successors and assigns, hereinafter designated as the "Employer", and LOCAL # 590, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, said Local being an unincorporated association and hereinafter designated as the "Union", for and behalf of itself and the employees now employed or hereafter to be employed by the Employer.

WITNESSETH:

WHEREAS, the Employer represents that it is engaged in the making of sweaters; and

WHEREAS, the workers employed by the Employer in the bargaining unit have duly designated the Union as their exclusive bargaining representative for the purpose of collective bargaining with the Emp'oyer with respect to rates of pay, wages, hours and othe conditions of employment; and

WHEREAS, the parties desire to cooperate in establishing conditions which will tend to secure a living wage, improved working conditions and fair competition insofar as labor cost is concerned, and to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties;

[fol. 180] NOW, THEREFORE, in consideration of the mutual promises and obligations herein assumed and contained and other good and valuable considerations, the parties agree as follows:

ARTICLE I: OBJECTIVES

It is mutually recognized that the primary objective of both parties in entering into this agreement is the promotion of orderly and peaceful relations and the achievement

of efficiency and uninterrupted production in the shop. This agreement sets forth the rights and obligations of each party to the other party. It establishes a foundation for the demonstration of a mutually cooperative spirit wherein the parties agree that they have an interest and an obligation in the welfare of the industry in which they are engaged. Each party obligates itself to do everything possible to eliminate needless controversies and to promote economic and industrial harmony, and undertakes in good faith to carry out and comply with the terms of this agreement, both in letter and in spirit.

ARTICLE II: UNION RECOGNITION

The bargaining unit covered by this agreement consists solely of all non-supervisory production and shipping department workers employed by said Employer, excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors. It is agreed that [fol. 181] the Union represents a majority of such workers and that it shall be the sole and exclusive bargaining representative for all workers in the bargaining unit during the entire period of this agreement. This agreement shall apply only to employees within the bargaining unit. Neither the Employer nor any of its agents shall directly or indirectly discourage membership in the Union.

ARTICLE III: UNION MEMBERSHIP

1. All new employees shall upon their employment be informed by the Employer of the existence of this agreement and the terms thereof and advised by the Employer that, in its opinion, good Labor-Management relations are and will be best served and promoted if such workers become and remain members of the Union after a trial period of sixty (60) days' employment by the Employer.

2. The Employer agrees to implement and promote the above by posting copies of the following "Notice" near all time clocks and at other prominent places such as Bulletin Board in the shop or shops:

"NOTICE TO ALL EMPLOYEES"

"This shop is being operated under the terms of an Agreement with a local of the International Ladies' Garment Workers' Union, AFL-CIO. All wages, hours and other conditions of employment are regulated by the terms of this Agreement, and good Labor-Management Relations will be best served and promoted, in [fol. 182] our opinion, if all our employees covered by this Agreement become and remain members of this Union.

"Signed.....

"Name of Employer....."

ARTICLE IV: TRIAL PERIOD

Newly hired workers shall after a trial period of sixty (60) days be considered regular employees of the Employer and shall be entitled to all rights, privileges and benefits of regular employees under this agreement. During said sixty (60) day trial period, the worker may be discharged by the Employer for any reason whatever in its discretion, and such discharge shall not be subject to grievance procedure or arbitration.

ARTICLE V: CHECK-OFF

1. Subject to the requirements of law, including authorization and assignment by the workers individually, the Employer agrees to deduct membership dues (which shall be deemed to include periodic fixed dues, initiation fees, and assessments) from the earnings of Union employees as directed by the Union and transmit the same to the Union monthly.

2. Such authorization and assignment shall be irrevocable for one (1) year, or until the termination of this agreement, whichever occurs sooner, and shall be automatically renewed and shall be irrevocable for successive periods of one (1) year each or for the period of each succeed- [fol. 183] ing applicable collective agreement between the Employer and the Union, whichever shall be shorter, unless the employee gives written notice of revocation to the

Employer and the Union not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one (1) year, or of each applicable collective agreement between the Employer and the Union, whichever occurs sooner.

3. The Union agrees to furnish the Employer with signed authorization from each Union member for the deduction above referred to, and the Employer shall not be required to make deductions until receipt thereof.

4. It is mutually agreed that the amount of membership dues owed by any Union employee of the Employer to the Union is a matter concerning only the individual employee and the Union, and the Employer assumes no obligation or authority whatever in the settlement of any such dispute or question that may arise.

5. The Union will indemnify and hold the Employer harmless from any claims, charges or demands made against the Employer by reason of any deductions or payments made by the Employer pursuant to this ARTICLE.

ARTICLE VI: HOURS—OVERTIME

The standard hours of employment shall be forty (40) hours per week and overtime shall be paid as required by the Fair Labor Standards Act. The Employer shall have the right to operate the plant on the basis of four shifts without any shift differentials. If there is a fourth shift [fol. 184] in effect up to December 31, 1957, work performed on Sundays shall be paid for at the straight-time rates. After January 1, 1958, work performed on Sundays shall be paid for at the rate of time and one-half.

ARTICLE VII: WAGES AND STANDARDS

1. Each employee working on September 3, 1957, shall receive a wage increase of five (5%) percent effective as of that date as hereinafter set forth. All time work rates shall be increased by said five (5%) per cent. In the case of piece workers, the said five (5%) percent shall be paid on top of their piece rate earnings. After a reasonable period, the Employer may take up with the Union the question of

incorporating said five (5%) percent into the piece rates. In the event of any disagreement, the matter shall be treated as a dispute under ARTICLE XXVI.

2. After completion of the trial period of sixty (60) days, all employees shall receive a minimum wage of no less than One Dollar and Ten Cents ($1.10) per hour.

3. The present piece rate for toppers shall be negotiated between the parties, written notice thereof having been given to the Employer by the Union before October 1, 1957. If the parties are unable to agree, the matter shall be arbitrated under ARTICLE XXVI, provided the Union requests such arbitration prior to November 1, 1957. Any increase agreed to by the parties or awarded by the arbitrator shall be retroactive to September 3, 1957.

[fol. 185] 4. Piece rates for new or modified items, products, styles, designs or operations, or for new methods of work resulting from changes in processes, production or equipment shall initially be fixed by the Employer, subject to the Union's right to review the same. If a written complaint is made by the Union with respect thereto within thirty (30) days after the institution of such rates, the matter shall be negotiated between the parties. In the event of any disagreement the matter shall be treated as a dispute under ARTICLE XXVI. Any increase agreed to by the parties or awarded by the arbitrator shall be retroactive to the initial inception of the rates.

5. During the term of this agreement, wages and piece rates now existing or hereafter established in the Employer's shop shall not be lowered. However, as to rates hereafter established and in force for less than thirty (30) days, the Employer may review the same and set a lower rate than the one initially instituted, provided, however, that such resetting occurs no later than thirty (30) days after the rate is initially instituted and the Union is immediately advised thereof in writing. Such reset rate shall thereupon be subject to the Union's right to review the same in accordance with the procedure set forth in Paragraph 4 above.

6. There shall be one uniform system of work, that is time work or piece work, for each craft in the shop. No change of system may be effected without the consent of the Union. In the event of any disagreement, the matter shall be treated as a dispute under ARTICLE XXVI.

[fol. 186] 7. The Employer may grant merit, length-of-service, or other individual increases or adjustments only upon approval by the Union.

ARTICLE VIII: DISCHARGES AND DISCIPLINE

No worker shall be discharged or otherwise disciplined without good and sufficient cause, except during his trial period. In case of any dispute regarding a discharge or disciplinary action, the matter shall be treated as a dispute under ARTICLE XXVI. If the Union challenges the justification for the discharge or disciplinary action, it must give notice thereof within five business days after such discharge or disciplinary action, or else the same shall be conclusively deemed to have been made for good and sufficient cause. Arbitration of such disputes shall be expedited. An employee who is discharged or suspended shall thereupon leave the premises, but if the discharge of disciplinary action is found to be unjustified, the arbitrator may direct that the worker be compensated for the loss of his earnings during the period of such discharge or disciplinary action.

ARTICLE IX: DISTRIBUTION OF WORK

1. At all times work shall be distributed among the workers in each department on an equal and equitable basis, subject to ARTICLE XXI.

2. No member of the Employer or supervisory employee shall perform any work in any craft that is required in the making of the Employer's product, if the same causes or extends a lay-off of any worker.

[fol. 187] 3. If a worker has been laid off and any member of the Employer or supervisory employee does his work, the Employer shall reimburse the worker so laid off for his loss of earnings and shall immediately reemploy him.

ARTICLE X: CHAIRMAN OR CHAIRLADY—COMMITTEE

There shall be a Shop Chairman or Chairlady and Committee selected by or under the auspices of the Union.

ARTICLE XI: DAMAGED GOODS

The Employer shall not charge workers for damage to material unless caused wilfully or by gross neglect.

ARTICLE XII: ASSIGNMENT TO OTHER WORK

1. A worker who is requested to perform work other than his regular work while his regular work is available shall receive for such other work not less than his average hourly earnings in his regular work during the last complete quarter prior to the change.

2. A worker may be assigned to perform work other than his regular work while his regular work is unavailable and shall receive for such other work the established time or piece rate therefor, or at the Employer's option, a guaranteed rate mutually agreed on with the Union, but in no event less than the minimum provided in this agreement. The worker, however, shall have the right to go home instead of doing such work.

[fol. 188] 3. A permanent transfer of a worker while his regular work is available shall not be made without the consent of the Union. In the event of any disagreement, the matter shall be treated as a dispute under ARTICLE XXVI.

ARTICLE XIII: HOLIDAYS

1. The following holidays shall be observed and all employees who have completed their trial period shall be paid for them regardless of whether such holidays fall on a working or non-working day of the week or in any non-working week:

Labor Day (During 1957 Thanksgiving Day is substituted for Labor Day)
Christmas Day
Fiesta Day

2. An employee shall be ineligible for holiday pay if he has been laid off or is otherwise absent from work for thirty (30) consecutive days immediately before the holiday plus thirty (30) consecutive days immediately after the holiday. An employee shall also be ineligible for holiday pay if, while work is available, he fails to work either the working day before or the working day after the holiday unless such absence is for justifiable cause.

3. Holiday pay for each piece worker shall be calculated at his average hourly earnings during the last complete quarter prior to the holiday. Holiday pay for each time worker shall be calculated at his current rate.

[fol. 189] 4. In the event work is performed on any such holiday, it shall be paid for at straight time in addition to the holiday pay, but any worker has the right not to work on any such holiday.

ARTICLE XIV: RIGHT TO LEAVE SHOP—CALL-IN TIME

1. Workers shall not be required unreasonably to remain in the shop during the day when there is no work for them. All workers who are requested or permitted to report for work shall be supplied with at least four (4) hours' continuous work or be paid therefor. In such event the Employer may assign the worker to any work it desires, but the worker shall be paid at his average hourly earnings during the last complete quarter.

2. Posting of a notice in the department or oral notice to the worker before the end of a shift advising the worker not to report the next day shall be sufficient notice to preclude the obligation of call-in time. Notice shall not be required and call-in time shall not be paid if lack of work or inability to give notice is due to physical conditions beyond the Employer's control including without limitations fires, storms, floods or failure of power.

ARTICLE XV: HEALTH AND WELFARE FUND—HOSPITAL AND SURGICAL POLICY

1. The Employer shall pay monthly to the San Antonio ILGWU Health and Welfare Fund to support the San

Antonio Garment Workers Medical Survey Clinic, a sum [fol. 190] equivalent to one and one-quarter (1¼%) percent of its total gross monthly payroll (before deduction for Federal or State taxes) of all employees covered by this agreement (whether regular or trial period workers), payment to be made through the office of the Union. Said Fund is a trust fund established by collective agreement prior to January 1, 1947 and maintained in trust for the purpose of providing (or purchasing insurance to provide) health, welfare, death, and recreation benefits or services and such other benefits as may be provided to employees of contributing firms under the Rules and Regulations of said Fund: said Rules and Regulations being hereby incorporated into this agreement as a part thereof by reference. The payments made hereunder by the Employer shall not constitute or be deemed wages due to the workers.

The Fund shall continue to be maintained and administered in accordance with the By-Laws or Rules and Regulations adopted for the Fund or as the same may be amended.

The Fund shall be held and administered by a Board of Trustees composed of Union representatives and an equal number of representatives of employer contributors to said Fund.

An annual audit of the Fund shall be made, a statement of the results of which shall be available for inspection by interested parties as the principal office of the Fund.

Neither the Employer nor any individual employee shall have any right, title or interest in, or claim against the Employer's payments toward the Fund, or against the [fol. 191] Fund except as may be provided by said By-Laws or Rules and Regulations for the Fund.

No payment made into the Fund shall be used for purposes which exceed the purposes of the law applicable to such Funds.

In the event that payments hereunder shall be held by the United States Treasury Department not to be a deductible expense for income tax purposes, the Employer may discontinue such payments. The Employer shall not be liable or responsible in any manner for the operation or maintenance of such Clinic, and its liability shall be limited to payment of the amounts specified in this ARTICLE.

2. The Employer shall maintain the existing hospital confinement and surgical benefits policy upon condition that an employee may be covered thereby by paying one-half the cost and the Employer shall pay the other one-half. Dividends or rebates from the insurance company shall be divided equally between the Employer and the covered employees. The Employer may deduct from wages the employee's share of the premiums.

ARTICLE XVI: SANITATION—INDIVIDUAL CONTRACTS—SECURITY—SUB-CONTRACTING

1. The Employer shall maintain proper sanitation and ventilation standards in its shop or shops at all times, and shall comply with all laws relating thereto. The Shop Chairman or Chairlady and Committee will cooperate in enforcing this provision.

[fol. 192] 2. The Employer shall not enter into individual contracts with any of its workers, nor shall the Employer accept security from any of its workers.

3. There shall be no sub-contracting by any employee in the shop.

ARTICLE XVII: APPLICATION OF AGREEMENT—WORK OUTSIDE OF SHOP

1. The terms of this agreement shall apply to the shop specified in this agreement and to any other shop or shops operated by or for the Employer in San Antonio engaged in the production of the same general line of apparel.

2. The Employer shall have no work normally performed inside its own shop performed outside of its own shop unless the workers of its inside shop are fully supplied with work.

ARTICLE XVIII: VACATIONS

A vacation period during June, July, or August shall be set by the Employer after consultation with the Union prior to May 1st. All workers employed for less than five (5) years by such June 1st and who have worked at least 1000 hours but less than 1600 hours in the twelve months prior to such June 1st shall receive three (3) days' paid

vacation. All workers employed for less than five (5) years by such June 1st and who have worked at least 1600 hours in the twelve months prior to such June 1st shall receive one (1) week's paid vacation. All workers employed for five (5) years or more by such June 1st and who have [fol. 193] worked at least 1000 hours but less than 1600 hours in the twelve months prior to such June 1st shall receive one (1) week's paid vacation. All workers employed for five (5) years or more by such June 1st and who have worked at least 1600 hours in the twelve months prior to such June 1st shall receive two (2) weeks' paid vacation. Vacation pay shall be calculated on the worker's average hourly earnings during the preceding year in the case of piece workers, and on his rate prevailing on such June 1st in the case of time workers.

ARTICLE XIX: STRUCK WORK

The Employer after written notice from the Union shall not perform any work for or give any work to any concern against which a strike has been declared, and in no event shall it request any of its employees to perform work destined directly or indirectly for such concern. Such work shall not be deemed in the worker's regular course of employment, and the workers need not perform such work.

ARTICLE XX: EXAMINATION OF BOOKS

The Employer shall, upon request by the Union, submit the payroll books and other pertinent records for examination at the Employer's plant for the purpose of ascertaining whether the Employer has complied with the terms of this agreement. The failure of the Employer to submit such books and records shall be presumptive evidence of the violation complained of and shall justify sustaining the Union's complaint.

[fol. 194] ARTICLE XXI: LAY-OFF AND REHIRING

1. The Employer may lay off workers in the manner hereinafter provided. In the event of a reduction of force in any department for any reason, the workers shall be laid off in inverse order of seniority in such department,

provided, however, that the worker retained can perform the work satisfactorily. Upon resumption of work, the workers shall be rehired in reverse sequence, i.e., the last laid off shall be the first rehired. Seniority status shall not be affected by law-off except as hereinafter provided.

2. Any employee laid off for six (6) continuous months, or who is absent because of illness or any other reason for six (6) continuous months, shall lose his seniority and status as an employee and shall not be entitled to rehiring. Any laid-off employee who does not return to work within five (5) days after the Employer has mailed to such employee at his last known address a notice to return shall lose his seniority unless such failure to return to work is for justifiable cause.

ARTICLE XXII: ACCESS TO SHOP

Representatives of the Union shall have access to the shop of the Employer during business hours for the purpose of taking up complaints and for the purpose of ascertaining whether the terms of this agreement are being complied with. The representative shall notify the office before entering the plant, and shall not interfere with or interrupt the work of employees.

[fol. 195] ARTICLE XXIII: AGENCY

The Employer agrees that the sole person authorized or having the power to act as agent of the Union, or to bind the Union legally with respect to matters arising out of this agreement or arising out of the relations between the Employer and the Union, or to subject the Union to any liability whatever by reason of any act or omission is the Regional Director of the Union or the Business Agent servicing the shop (or such substitute or additional persons as the Union may hereafter formally designate by written notice to the Employer). The Union shall not be responsible for the acts or omissions of any other persons, including members and employees of the Union. The Employer further agrees that the Union, in entering into or administering this agreement, is not an agent of or acting on behalf of the International Ladies' Garment Workers'

Union, and that in no event shall the latter be bound by or liable under this agreement or be otherwise liable.

ARTICLE XXIV: CROSSING PICKET LINE

It shall not be considered a breach of this agreement on the part of the Union or on the part of any invidual employee if any employer or employees refuse to cross a picket line recognized by the Union, or to enter upon the picketed premises of the Employer or other concern, either of their own volition or by direction of the Union, nor shall such refusal be cause for discharge or discipline.

[fol. 196] ARTICLE XXV: NO-STRIKE, NO-LOCKOUT PLEDGES

The Union agrees that it will not call, authorize or ratify a strike, slowdown or stoppage during the life of this agreement, except for the employer's failure to submit to arbitration or to comply with the decision of an arbitrator. Should an unauthorized strike, slowdown or stoppage of work by Union members occur, the Union's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Employer, to bring about the return to their work of its members who have stopped work and to instruct them to return to work immediately. Upon the failure of any employees to return to work within said twenty-four (24) hour period, the Employer may at its option consider that such employees have abandoned their employment and may discharge them. Compliance by the Union in good faith with this provision shall be deemed full compliance with the Union's obligation hereunder.

The Employer agrees that it will not order, authorize or ratify a lockout during the life of this agreement. Should a lockout occur, the Employer's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Union, to terminate the lockout and to reemploy the employees. Upon the failure of the Employer to do so within said twenty-four (24) hour period, the Union at its option may [fol. 197] treat the matter as a dispute to be determined under the machinery for adjustment of disputes, as pro-

vided in this agreement, or may consider that the Employer has forfeited its rights under the agreement.

ARTICLE XXVI: ADJUSTMENT MACHINERY—COURT ACTIONS BARRED

1. Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employee and the Employer, which directly or indirectly arise under, out of, or in connection with or in any manner relate to this agreement or the breach thereof, or the acts, conduct or relations between the parties shall be adjusted as follows:

(a) The aggrieved employee or employees must bring the matter to the Union Committeeman who together with the Shop Chairman or Chairlady shall attempt to settle the matter with the Plant Manager or Production Manager or their designated representative.

(b) If the matter is not thus settled, the aggrieved employee or employees shall fill out and sign two copies of the regular grievance form supplied by the Union, stating in full the nature of the grievance or dispute. This form shall be referred to the Shop Chairman or Chairlady and Committee who shall serve a copy thereof on the Employer. A conference to settle the matter shall be held within forty-eight (48) hours thereafter, attended by the Shop Chairman or Chairlady and Committee and a Representative of [fol. 198] the Union who may be a non-employee of the Employer, and the Plant Manager or Production Manager or their designated representative. Such conferences and all other grievance procedures shall not normally be held during working hours, and in no event shall the Employer be required to pay for the time of any employees or the Shop Chairman or Chairlady or Committeemen in connection therewith.

(c) If the parties nevertheless fail satisfactorily to dispose of any such dispute, complaint, controversy, claim or grievance, or if the matter does not lend itself to the foregoing procedure, or if for any reason it has not been taken up by them, the matter shall be submitted to arbitration before Mr. Leo Guzik who shall be the arbitrator under

this agreement. The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper, may contain provisions commanding or restraining acts and conduct of the parties. Any award or decision of the arbitrator shall be final and binding and shall be enforceable by appropriate proceedings in law or in equity. The taking of the oath by the arbitrator is hereby expressly waived. His fee shall be borne equally by the parties hereto.

2. It is the intention and agreement of the parties that the procedure herein established for the adjustment of disputes shall be the exclusive means for the determination of all disputes, complaints, controversies, claims or grievances [fol. 199] whatsoever, including claims based upon any breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in court of law or equity, state or federal, other than to compel arbitration, as provided in this agreement, or to enforce the award of an arbitrator. This provision shall be a complete defense to any action or proceeding instituted contrary to this agreement.

ARTICLE XXVII: CHANGE IN LEGAL MINIMUMS

Should Federal or State legislation become effective, increasing the minimum wages under the law to One Dollar and Fifteen Cents ($1.15) per hour or less, it is agreed that the minimum wages under this agreement shall be at least ten (10¢) cents an hour above the law's requirements. Should the minimum wages under the law be increased above One Dollar and Fifteen Cents ($1.15) per hour, the minimum wages under this agreement shall be discussed between the Employer and the Union, but shall not be subject to grievance procedure or arbitration.

ARTICLE XXVIII: INFORMATION

The Employer shall furnish to the Union monthly the names and addresses of all newly hired workers and dates of hiring, the names of all terminated workers and dates of termination. The Employer shall also furnish the Union

quarterly the average hourly earnings of all workers individually and by department classification.

[fol. 200] ARTICLE XXIX: CONFORMITY TO LAW-SAVING CLAUSE

1. If any provision or the enforcement or performance of any provision of this agreement is or shall at any time be contrary to law, then such provision shall not be applicable or enforced or performed, except to the extent permitted by law. If at any time thereafter such provision or its enforcement or performance shall no longer conflict with law, then it shall be deemed restored in full force and effect as if it had never been in conflict with the law.

2. If any provision of this agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this agreement, or the application of such provision to other persons or circumstances, shall not be affected thereby.

ARTICLE XXX: TERM

This agreement shall go into effect as of the 3rd day of September 1957, and shall continue in effect until the 31st day of December 1959, and shall thereafter automatically be renewed from year to year unless either party shall notify the other party in writing at least sixty (60) days prior to any such expiration date that it desires to change or modify the terms thereof.

In Witness Whereof, the parties have hereunto set their respective hands and seals, and caused this agreement to [fol. 201] be signed by their respective officers the day and year first above written.

Bernhard Altmann Texas Corporation

By /s/ Wolf H. H. Plecher

Local # 590 International Ladies' Garment Workers' Union

By /s/ S. C. Chaikin

[fol. 202]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 4*

August 31, 1957

	Richard A. Simon	23	*Celia Zamudio Flores*
	Frank H. Robbins	24	*Mary A. Mendoza*
	Thomas Kovalski	25	*Ella W. De Viney*
	Andrew Gonzales	27	*Nora V. Felan*
	Thomas Covelski	29	*Elena S. Longoria*
	Rudy V. Lopez	35	*David Max Crowe*
	Herschel E. Fix	45	*Bruno W. Meyer*
	Herbert Lemes	56	Hercilia Olivares
	Gilberto Hernandes	63	Sophie D. Terres
	James Lohso	70	Rudolpho Saenz
	Melan D. Oestreich	71	*Kathryn B. Herlong*
	Careio B. Stricklen	72	*Alice G. Morrison*
	Doris LaVerne Burnett	73	*Elisa Sanchez*
	Horase G. Potts	79	Elena Arrambide
	Sam Liberto, Jr.	80	Romelia R. Rios
	Gertrad Plecher	81	Dorothy Applewhite
	Bertie J. Dodds	82	Mary M. Luna
	Janet Lieske Wrenn	84	Pablo G. Rodriguez
	Burnette Juares	94	Mary Louise Mejia
	Stella Gonzales	95	Esther G. Gonzales
	Ruth E. Stanteen	98	Antonia H. Sescho
	Ruth A. Hopkins		(Formerly Patino)
	Fernando C. Rejada	102	Ninfa M. Escamilla
	Erma H. Byron	110	*Tommie L. Dotrav*
	Robbie R. Lewellyn	113	*Robert N. Chaddock*
	Laura S. de Saens	114	*Lemuel C. Gay*
	Sarah Bishop	116	*James C. Anderson*
2	*Marcus Cuzman*	117	*Howard B. Still*
3	*Alfonso Medrano*	118	*Pilar M. Ribera*
6	*Gregoria Gaitan*	126	*George W. Lagus*
7	Minnie Escamilla	131	Alice Devora
13	*Olivia Villa*	132	Isabel A. Cuellar
14	*Carmen Guadiano*	133	*Margarita Huisar*
18	*Moszek Rogalski*	134	Robert Rossett
21	*Lydia Hune*	151	*Albert V. Morin*

* Italicized names are encircled on original exhibit.

[fol. 203]

152 Ignacio Martinez
153 *Horst J. Trenz*
154 Leonardo Torres
155 *Antonio E. Torres*
158 *Anthony M. Plata*
159 Felipe Garcia
163 Humbertò H. Arredondo
164 Josephine Gaytan
165 Sarah H. Guzman
(Formerly Novares)
168 Robert I. Vargas
171 Juan G. Arocha
172 Rey Ruiz
174 Antonio L. Ortiz
177 George C. Araujo
178 Lupe J. Hernandez
195 Frank Ruis
220 Antonia Beltran
221 Maria de Jesus Mathey
222 Julia M. Picon
224 Armendina Garcia
225 Pura G. Flores
226 Maria Medrano
227 Modesto M. Hernandez
229 Gregoria D. Calville
232 Ramona O. Balderas
233 Victoria Gonzales
234 Ninfa A. Gonzales
237 Rose M. Davila
238 Petra Murille
240 Josephine V. Montoya
248 Mamie Cardena
256 Bertha E. Zuniga
262 Felipe R. Villarreal
263 Cuca M. Garza
381 Paula M. Barrera
382 Virginia I. Rodriguez
385 Minerva M. Morado
386 Angela R. Trevino
(Formerly Rodriguez)
387 Ninfa P. Balderas
390 Olivia Aguinaga
392 Bennie Gonzales
397 Paulette Gonnet
400 Frances P. Gonzales
405 Hortencia Hernandez
406 Pauline G. Herrera
409 Mary Z. Gonzales
410 Guadalupe V. Castillo
441 Antonia P. Carego
413 Lidia Salazar
418 Mary L. Garcia
419 Elvira P. Sunigo
421 Felicita Limon
422 Juana G. Padilla
434 Helen M. Riojas
435 Gregoria R. Galindo
436 Carlota Rabazo
438 Caroline T. Moncada
439 Olivia M. Rodriguez
444 Guadalupe Silva
445 Elva Hernandez
446 Bernalda Zamora
447 Concepcion Delgado
449 Alicia M. Osorio
451 Linda S. Molina
454 Juanita Hernandez
461 Elia G. Ortiz
463 Olga Z. Morales
465 Jessie A. Salinas
466 Maria Garcia Garza
467 Thayde Pazuengo
478 Rosa P. Valerio
482 Bertha Garcia
483 Ofolia V. Vargas
486 Cristina G. Solis
492 Irene M. Perez
493 Teodora S. Rodrigues
612 Vidal Galindo
613 Ernest C. Gonnet

[fol. 204]

614 Dolores B. Hernandez
615 Betty J. Addington
617 Mary M. Lucio
618 Celia B. Munis
623 Santes Castillo
624 Roger C. Gonnet
625 Juan Flores Ledesma
627 Antonio S. Barbesa
628 Reynaldo V. Reyes
629 Ramon Vera
632 Pedro T. Gomez
634 Florinda Martinez
633 Pedro A. Aguirre
636 Carlos G. Garza
640 Rita A. Ledesma
644 Florentino C. Segovia
681 Buriqueta Barrera
683 Adela E. Gil
687 Santos Valesquez
688 Lupe R. Valdes
692 Elma Puente
696 Josefa Robles
697 Mattie W. Gonzales
698 Bertna C. Morales
701 Maria De Luna
704 Willa L. Bell
706 Mary C. Ortega
711 Claudia L. Martinez
715 Dismantina N. Robles
717 Elvira Picos
718 Genovaba Rossies
721 Bertenzia Martines
725 Eleuteria Eng
726 Guadalupe P. A
727 Rafaela A. Paes
728 Conzuelo Sanchez
729 Mary B. Pritchard
730 Maria C. Montes
732 Mary L. Medellin
733 Paula C. Lopes
734 Tomasa M. Viera
736 Josephine Gloria
738 Olive K. Rivera
739 Jovita Hernandes
745 Emlalia S. Escamilla
746 Guadalupe Madrigal
747 Romana Folis
748 Lillie G. Jase
750 Eunice Rodriguez
756 Cecilia Martines
757 Elida S. Franco
881 Mary Alvares
882 Gertrudis Rodriques
883 Benita Cardenas
885 Bertha Salazar Munoz
886 Paulita Beltran
887 Elodia L. Muro
888 Mercedes Moira
890 Gloria M. Aguilera
891 Josephine M. Sanches
897 Ofelia F. Ruis
898 Mary G. Perez
899 Eva T. Devora
900 Guadalupe Cuellar
902 Prudencia B. Cortes
903 Carmen G. Armenta
904 Adela G. Campos
905 Teresa T. Medina
907 Mario J. G. Delgado
908 Calia M. Luna
910 Dolores Loera
912 Retner B. Medellin
913 Escuela P. Weiser
915 Emma E. Perez
917 Lydia H. Flores
921 Dora Galvan
922 Paula Valle
923 Herminia O. Trevino
924 Eugenia Rodrigues
925 Evangelina Nesues

[fol. 205]

928 Herlinda F. Vera
936 Julia C. Contreras
Thomas O. Teleman
William Herbert
Annette W. Stillwell
Patsy Jo Conally
Emma O. Poppin
19 *Nicolas Rodrigues*
26 *Ella G. Williams*
28 *Otilia T. Ortis*
33 *Lupe G. Salsa*
64 Irene G. Alexandro
76 Romana R. Rodrigues
85 Theodora Cadena
88 Tony Orosco
89 Prenciliano Martines
90 Antonia Z. Gonzales
91 Beatrice O. Castillo
93 Francisca de la Garza
97 Frances de la Torre
99 Mary Sielzki
100 Bridget Rolston
103 Lois W. Leonard
105 Guadalupe Balderrera
107 Herlinda Salezar
108 Margaret Vasques
120 *Johnnie Mae Ware*
122 *William O. Sill*
125 *Loyd Spencer, Jr.*
130 *Alfred C. Munos*
139 Doris Villarreal
111 *Roscoe Ware*
156 Santiago L. Valdez
161 Edward Barrera
162 Johnny Martines
167 Frank Samudio
169 Cristobal Arias
173 Oscar M. Banda
216 Raul V. Huizar
236 Estela M. Garcia
239 *Margaret Gonzales*
241 Dominga C. Martines
249 Mary M. Ortiz
250 Angie Q. Domingues
251 Christopher S. Oliva
255 Augustine D. Longoria
260 Blasa M. Ibarre
261 Esperanza C. Moran
265 Carlos B. Hernandez
266 Hector G. Garcia
268 John S. Torres
269 Martin A. Ortiz
270 Roque P. Ruiz
271 Robert I. Phelps
272 Bernard F. Kevalski
274 James R. Clark
275 Donald M. Natala
277 Wayne D. Martin
279 Armando Arrambide
282 William Letcher
283 Francisco R. Moreno
384 Guillerma Villarreal
386 Marina Rodrigues
424 Isabel M. Martines
425 Sylvia Cardenas
430 Consha R. Ramires
432 Mary R. Molina
441 Crescencia Trevino
442 Edelia V. Sanchez
450 Stella S. Molina
459 Elida M. Ayala
462 Maria E. Hernandes
468 Jesusita Galan
469 Martha Saens
470 Sadio M. Almaguer
473 Laura O. Garza
475 Carmen Zamora
477 Anita Franco
481 Altagracia A. Enriques
488 Teodula Ramos

[fol. 206]

489 Dorothy N. Hernandez
490 Antonia Ledeama
491 Luisa A. Lopes
494 Eudelia Galindo
496 Mary L. Hernandes
497 Blanche A. Martines
500 Mary Cora Medina
501 Lupe F. Hernandes
502 Angelina M. Maneillas
503 Hermelinda L. Carrillo
611 Manuel Segura Jr.
616 Rita F. Salomon
622 Hermenia V. Guerra
631 Mike V. Contreras
707 Elizabeth C. Duron
709 Maria N. Castilla
710 Maria Badillo
712 Aristez M. Guardia
735 Marina Moreno
737 Petra C. Galindo
751 Carolina Carreon
754 Maria Eugenia Sanches
758 Aurelia L. Villarreal
759 Mary C. Martines
761 Emilia Saens
762 Clotilda M. Tames
763 Alicia S. Munos
889 Margaret G. Barrientes
894 Concepcion Mendoza
895 Velia Solis
896 Estela Z. Davila
914 Manuela Bernal
916 Rosa Rodrigues
918 Loyce B. Lovell
920 Isabella N. Lopes
927 Maggie M. Harris
930 Consuelo G. Rivas
931 Lupe V. Chatman
932 Alice S. Solis
437 Victoria D. Valdes
760 Lofland Flores
140 Willie R. Vogues
633 Andrea L. Gomes
637 Pauline G. Robledo
638 Juan Cantu Jr.
639 Neil G. Mendiola
645 Raul Gonzales
690 Bertha V. Valdez
693 Lupe C. Robles
699 Selestine Lopez
700 Luisa Mores

[fol. 207]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 5

2/13/58

PERSONS PAID ON JULY 27, 1957 PAYROLL BUT NOT APPEARING ON AUGUST 31, 1957 PAYROLL

55 Susie Romo
86 Carlota Sanchez
87 Helen Martinez
106 Janies Salazar
157 Robert Beltran
175 Pete Silva
176 Mateo Sanchez
218 Victoria Cruz
219 Susie Rios
231 Petra Martinez
242 Ruth B. Hernandez
243 Mary L. Chaves
244 Dora L. Reyes
245 Adelina Chapa
247 Consuelo Felan
252 Cirilda C. Lozano
254 Ruben Davila
383 Carrie P. Ruiz
417 Isabel R. Mercado
426 Ofelia Hernandez
429 Mary Baez Banda
448 Sira Ramirez
452 Concepcion Reyna
453 Julia Moreno
460 Luz Garcia
471 Susie Cruz
474 Carmen Rodriguez
479 Enemecia A. Lara
487 Maria de Jesus Torres
495 Josephine Valencia
498 Petra Castillo
619 Luiza Maldonado
620 Aurora Contreras
642 Joe Lopez
643 Michael Chapa, Jr.
689 Mary Helen Tejeda
691 Lily M. Maldonado
702 Petra Garza
705 Stella Faz
708 Antonia T. Hernandez
713 Lily Wilburn
714 Emelia Flores
716 Juanita Romo
719 Velia Tamez
720 Concha Huron
722 Juanita Vasquez
929 Josefina Flores
207 Joe R. Vidaurri
208 Fernando F. Bustamante
209 Eugene Devora
210 Pablo Rabago
211 Bernardo N. Lugo
212 Rudy M. Villegas
253 Juan E. Escamilla
258 Andrew B. Cianeros
259 Oscar R. Villa
179 Jorge M. Cantu
180 Dionicio P. Luna
181 Thomas P. Almaraz
182 Emilio Baez, Jr.
183 Manuel Cuellar
184 Paul F. Gonzales
185 Salvador R. Gonzales
186 Jaime R. Juarez
187 Juan Almaraz
188 Hilario H. Rios
189 Paul R. Villa

[fol. 208]

190 Pedro de Luna
191 Henry Rodriguez
192 Fred L. Reyes
193 Alberto M. Rodriguez
194 Frank R. Hernandez
196 Felipe Mata
197 Arnulfo G. Reyes
198 Nicolas Gonzales
199 Severo Rodriguez
200 Aurelio Guillen
201 Guadalupe Z. Rojas
202 Jesse S. Benitez
203 Alberto Chavez
204 John Longoria
205 Daniel Rodriguez
214 Martin F. Vargas
215 Ernest Rivera
8 Jesus M. Ayala
52 Frank Q. De Leon
53 Arthur Vasquez
54 David Gomez
160 Henry de Luna
414 Martha Balderas
404 Irene Bustamente
412 Abelardo E. Calderon
440 Cipriana Briseno
433 Juanita Prado
431 Susie M. Garcia
428 Eloisa Valdez
416 Adelina B. Alvarez
427 Frances Herrera
415 Oralia T. Carrillo
407 Lilly Vega
403 Ramona B. Oliva
402 Herminia R. Ruiz
401 Frances Cantu
399 Carmen L. Avina
398 Felisa Rodriguez
396 Paula R. Lopez
395 Georgia T. Diaz
394 Zoila M. Guantes
391 Mary Ann Sendejo
443 Mary E. Vasquez
420 Estella M. Meza
476 Consuelo P. Kelly
393 Adelina F. Ramon
389 Lidia F. Silva
62 Anita Hernandez
78 Margarito O. Barrera
61 Cecilia Villa
223 Juanita M. Reyes
Manuel Ochoa
Mariano Zuniga

[fol. 209]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 9

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases No. 39-CA-691
39-CA-729
39-CA-736
39-CA-737
39-CA-738

In the Matter of

BERNHARD-ALTMANN TEXAS CORPORATION

and

LOYCE LOVELL, JOHN S. TORRES, JULIA C. CONTRERAS, IRENE PEREZ, MINNIE ESCAMILLA

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Party to the Contract

Cases No. 39-CB-191
39-CB-213
39-CB-219
39-CB-220
39-CB-221
39-CB-222

In the Matter of

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

and

LOYCE LOVELL, JOHN S. TORRES, IRENE PEREZ, MINNIE ESCAMILLA, JULIA C. CONTRERAS, NINFA M. ESCAMILLA

and

BERNHARD-ALTMANN TEXAS CORPORATION

Party to the Contract

[fol. 210]

STIPULATION OF TESTIMONY

It is hereby stipulated and agreed by and between the International Ladies' Garment Workers' Union, AFL-CIO, by their attorney, Charles Morris; the Bernhard-Altmann Texas Corporation, by its attorney, Leo Guzik; and Franklin R. Sears, Counsel for the General Counsel of the National Labor Relations Board, that the following questions and answers shall constitute the entire testimony of Mr. Wolf Plecher in the Hearing of the cases No. 39-CA-691, et al, and 39-CB-191, et al, said hearing being held in San Antonio, Texas:

Question: What office do you hold in the Bernhard-Altmann Texas Corporation?

Answer by Mr. Plecher: Vice President.

Question: Did you, on behalf of the Company sign a Memorandum Contract with the International Ladies Garment Workers Union on August 30, 1957, covering its employees at its San Antonio plant?

Answer by Mr. Plecher: Yes.

Question: Did the Union show you any authorization cards signed by employees of the San Antonio Plant of the Company before you executed the Memorandum Agreement on August 30, 1957?

Answer by Mr. Plecher: No.

Question: Did the Union offer to show you any authorization cards signed by employees of the Company at its San Antonio plant before you executed the contract?

[fol. 211]

Answer by Mr. Plecher: I do not recall.

Question: Did the Company, before it executed the contract on August 30, 1957, request the Union to exhibit to it the authorization cards signed by the employees of the San Antonio plant?

Answer by Mr. Plecher: No.

Question: Did the Union during the negotiations preceding the execution of the contract of August 30, 1957, make reference to cards signed by employees at the San Antonio plant?

Answer by Mr. Plecher: Yes.

Question: At the time of the signing of the contract of August 30, 1957, did you have in your possession in New York City the payroll of the employees of the San Antonio plant?

Answer by Mr. Plecher: No.

Question: Since August 30, 1957, have you checked the authorization cards of the Union against the payroll records of the employees of the Company at the San Antonio plant?

Answer by Mr. Plecher: No.

Question: Prior to the signing of the contract of August 30, 1957, did the Union's representative state to you that the Union had authorization cards signed by a majority of the employees in the unit at the San Antonio Plant?

[fol. 212]

Answer by Mr. Plecher: Yes.

Signed at.....this

.....day of ....., 1958.

.....

Charles Morris

Signed at New York this 2nd day of June, 1958.

/s/ Leo Guzik

.....

Leo Guzik

Signed at San Antonio, Texas, this 5th day of June, 1958.

/s/ Franklin R. Sears

.....

Franklin R. Sears

Signed at New York this 3rd day of June, 1958.

/s/ Wolf Plecher

.....

Wolf Plecher

[fol. 213]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 10

NAME	DATE
Aguilera, Gloria Noriega	9/19/57
Aguirre, Pedro A.	2/ 1/57
Almarez, Juan	1/30/57
Almarez, Thomas P.	10/ 1/56
Alvarez, Adelina	2/12/57
Alvarez, Mary	8/22/57
Araujo, George C.	2/ 5/57
Arias, Cristobal	2/ 5/57
Arocha, Juan G.	12/ 8/56
Arrambide, Armando	7/31/57
Arrambide, Elena	9/23/57
Avina, Carmen L.	2/20/57
Ayala, Elida M.	8/ 7/57
Ayala, Jesus M.	10/ 1/56
Badillo, Mary	9/ 6/57
Baez, Emilio Jr.	2/ 5/57
Baez, Mary	10/17/56
Balderas, Martha	7/30/57
Balderas, Ramona O.	9/20/57
Banda, Oscar	2/21/57
Barboza, Antonio	1/10/57
Barrera, Enriqueta	8/26/57
Barrera, Margarito O.	2/ 5/57
Beltran, Paulita	10/ 1/57
Benitez, Jesse S.	1/10/57
Briseno, Cipriana	8/ 2/57
Bustamante, Irene F.	7/31/57
Bustamante, Fernando	10/ 9/56
Cadena, Theodora	9/25/57
Calderon, Abelardo E.	1/10/57
Cantu, Frances F.	2/17/57
Cantu, Jorge M.	10/ 9/56
Cantu, Manuela P.	8/21/57
Carrillo, Oralia	3/17/57

NAME	DATE
Castillo, Beatrice	9/26/57
Castillo, Guadalupe V.	9/27/57
[fol. 214]	
Castillo, Santos	9/24/57
Chapa, Adelina	2/ 7/57
Chatman, Lupe	8/21/57
Chavez, Alberto	10/ 2/56
Cisneres, Andrew B.	7/ 3/57
Contreras, Aurora	1/28/57
Contreras, Elvira M.	9/24/57
Contreras, Mike V.	1/17/57
Cuellar, Manuel	10/ 3/56
Davila, Rose M.	9/19/57
De Leon, Frank Q.	10/ 9/56
De Luna, Henry	10/ 8/56
De Luna, Pedro	10/ 2/56
Devera, Eugene	10/ 1/56
Diaz, Gregoria	11/16/56
Escamilla, Juan E.	7/ 3/57
Felan, Consuelo	2/17/57
Galindo, Vidal	2/ 1/57
Garcia, Antonia P.	9/27/57
Garcia, Felipe	11/ 2/56
Garcia, Hector G.	9/ 8/57
Garcia, Mary L.	9/24/57
Garcia, Nicolas	10/10/56
Garcia, Susie M.	10/11/56
Garza, Carlos G.	9/24/57
Garza, Cuca M.	9/24/57
Garza, Fernando	1/23/57
Gomez, Adelaide T.	2/19/57
Gomez, David Jr.	7/ 9/57
Gomez, Andrea Leos	9/24/57
Gomez, Pedro T.	9/24/57
Gonnet, Ernest George	9/26/57
Gonnet, Roger C.	9/24/57
Gonzales, Frances F.	9/24/57

NAME	DATE
Gonzales, Mary Z.	5/11/57
Gonzales, Nicolas	10/ 2/56
[fol. 215]	
Gonzalez, Ninfa A.	9/24/57
Gonzales, Paul F.	10/ 2/56
Gonzales, Salvador	10/ 9/56
Gonzales, Victoria A.	9/18/57
Guantes, Zoila M.	1/ 5/57
Guerra, Herminia	9/24/57
Guerrero, Antonio R.	1/ 8/57
Guerrero, Marina	2/ 6/57
Guillen, Aurelio B.	10/10/56
Hatala, Donald	9/20/57
Hernandez, Anita	12/13/56
Hernandez, Carlos B.	9/ 2/57
Hernandez, Frank R.	10/ 1/56
Hernandez, Hortencia	11/18/56
Hernandez, Irene A.	9/24/57
Hernandez, Jovita	3/ 1/57
Hernandez, Juanita	8/21/57
Hernandez, Lupe F.	8/ 8/57
Hernandez, Lupe Jimmie	9/30/56
Hernandez, Modesto M.	9/ 2/57
Hernandez, Ofelia V.	9/26/57
Herrera, Frances	10/15/56
Herrera, Polin	3/ 9/57
Huizar, Raul	1/ 9/57
Juarez, Jamie R.	10/ 9/56
Kelly, Consuelo P.	2/ 8/57
Longoria, Augustine D.	8/31/57
Longoria, Juan	10/ 3/56
Lopez, Paula R.	11/26/56
Lozano, Cirilda C.	8/ 8/57
Lucio, Mary M.	1/28/57
Lugo, Bernardo	10/ 1/56
Luna, Dionicio P.	10/ 2/56

NAME	DATE
Maldonado, Luisa	2/ 7/57
Mancillas, Angelina	8/15/57
Martinez, Domiga	9/24/57
[fol. 216]	
Martinez, Isabel R.	2/ 8/57
Martinez, Ignacio	9/30/56
Martinez, Johnny	10/30/56
Mata, Felipe	10/ 9/56
Medina, Cora	8/ 8/57
Medrano, Maria	3/13/57
Mejia, Mary Louise	3/11/57
Mendiola, Neil C.	9/17/57
Mercado, Isabel C.	9/27/57
Meza, Estella M.	2/ 7/57
Molina, Mary R.	9/23/57
Montoya, Josie	3/18/57
Morales, Bertha C.	8/20/57
Moran, Esperanza C.	9/20/57
Moreno, Francisco R.	9/26/57
Moreno, Julia B.	3/ 1/57
Muniz, Celia B.	9/24/57
Murillo, Petra	9/24/57
Ochoa, Manuel G.	10/ 9/56
Oliva, Ramona	11/26/56
Orozco, Antonio S.	3/21/57
Ortega, Mary C.	3/11/57
Ortiz, Antonio L.	11/22/56
Ortiz, Martin A.	9/13/57
Padilla, Juana G.	1/ 5/57
Pazuengo, Thayde	9/24/57
Prado, Juanita A.	10/15/56
Rabago, Paul C.	9/30/56
Ramirez, Alice V.	2/18/57
Ramirez, Concha	10/16/56
Ramon, Adelina F.	2/15/57
Rangel, Esther Y.	9/24/57
Reyes, Arnulfo G.	10/ 9/56
Reyes, Fred	10/ 3/56

NAME	DATE
Reyes, Janies	3/29/57
Reyes, Reynaldo V.	1/15/57
Rios, Hilario	10/30/56
[fol. 217]	
Rios, Susie G.	7/18/57
Rivera, Ernest	10/ 3/56
Rivera, Mary M.	8/20/57
Rodriguez, Alberto	9/30/56
Rodriguez, Angela	12/16/56
Rodriguez, Carmen	8/21/57
Rodriguez, Catalina (a/k/a Hernandez)	9/ 2/57
Rodriguez, Daniel	10/ 9/56
Rodriguez, Eugenia	8/22/57
Rodriguez, Feliz	11/19/56
Rodriguez, Henry G.	10/22/56
Rodriguez, Joe	10/ 1/56
Rodriguez, Pablo	9/26/57
Rodriguez, Romana	9/26/57
Rodriguez, Severo	9/30/56
Ramirez, Sira	9/12/57
Rodriguez, Virginia	2/19/57
Rojas, Guadalupe	9/30/56
Romo, Susie V.	8/22/57
Rossetti, Robert	2/18/57
Ruiz, Carrie P.	2/ 5/57
Ruiz, Frank	10/30/56
Ruiz, Herminia R.	11/22/56
Ruiz, Roy	11/22/56
Saenz, Rudolpho	10/ 1/56
Salinas, Jessie A.	9/24/57
Salinas, Mary L.	2/ 4/57
Sanchez, Mateo	12/13/56
Segura, Manuel Jr.	3/10/57
Sendejo, Mary Ann	7/ 6/57
Silva, Lidia	12/16/56
Silva, Guadalupe	8/17/57
Soliz, Romana	9/23/57
Suniga, Elvira P.	3/ 5/57

NAME		DATE
Tejeda, Mary Helen		4/16/57
Tobar, Adella (Tober)		2/18/57
Trevino, Cresencia		8/ 9/57
Trevino, Herminia O.		3/21/57
[fol. 218]		
Valdez, Eloisa R.		10/15/56
Vargas, Martin F.		3/18/57
Vargas, Robert I.		11/22/56
Vasquez, Arthur		10/ 1/56
Vasquez, Mary E.		8/ 2/57
Vega, Lilly		4/16/57
Vera, Herlinda F.		9/25/57
Vera, Ramon		1/26/57
Vidaurri, Joe R.		10/ 9/56
Villa, Cecelia		11/ 8/56
Villa, Oscar R.		7/ 3/57
Villa, Raul		10/ 9/56
Villarreal, Felipa R.		9/24/57
Villarreal, Guillerma		8/ 6/57
Villegas, Rudy M.		10/ 9/56
Voges, Willie R.		2/12/57
Zuniga, Bertha E.		4/27/57
*Zuniga, Mariano		11/ 3/56
Chavez, Mary L.		8/23/57
Gonzalez, Raul M.		9/24/57
Hernandez, Ruth B.		8/ 6/57
Ortiz, Elia G.		9/24/57
Reyes, Dora		8/20/57
Reyna, Concepcion F.		7/22/57
Molina, Stella S.		10/ 7/57
Molina, Linda S.		10/ 7/57
Segovia, Florentino G.		9/24/57
Guadalupe Balderma	s/8/8/57 ret at her req on	9/24/57

(Original of this exhibit contains 28 additional names which have been completely crossed out.)

[fol. 219] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15038

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 15079

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BERNHARD-ALTMANN TEXAS CORPORATION, Respondent.

On Petition to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board

---

OPINION—Decided May 19, 1960

Mr. Charles J. Morris, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom Messrs. Morris P. Glushien and L. N. D. Wells, Jr., were on the brief, for petitioner in No. 15038.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, with whom Messrs. Thomas J. McDermott, Associate General Counsel, National Labor Relations Board, Marcel Mallet-Prevost, Assistant General Counsel, [fol. 220] National Labor Relations Board, and Herman M. Levy, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 15038 and petitioner in No. 15079.

Mr. Wallace M. Cohen entered an appearance for respondent in No. 15079.

Before Mr. Justice Burton, retired,* and Wilbur K. Miller and Fahy, Circuit Judges.

Mr. Justice Burton: These cases present the question whether it was an unfair labor practice, under §§ 8 (a)(1) and (2) and 8 (b)(1)(A) of the National Labor Relations Act, as amended in 1947,[1] for an employer and a union to enter into a collective-bargaining agreement recognizing the union as the exclusive bargaining representative of all of the employees in the proposed bargaining unit, although the union had not been authorized to act as their collective-bargaining representative by a majority of the employees. For the reasons hereafter stated, we are of [fol. 221] the opinion that such an agreement unlawfully restrained nonparticipating employees from their free exercise of the rights of self-organization guaranteed to them by § 7 of the Act[2] and also gave unlawful support to the

---

* Sitting by designation pursuant to 28 U.S.C. § 294 (a).

[1] "SEC. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .

. . . . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." 61 Stat. 140, 141, 29 U.S.C. § 159 (a)(1) and (2), and (b)(1)(A).

[2] "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 61 Stat. 140, 29 U.S.C. § 157.

participating union. We therefore agree with the National Labor Relations Board's decision that such conduct in the cases before us was an unfair labor practice which the Board properly ordered discontinued.

The General Counsel for the National Labor Relations Board filed a complaint against the Bernhard-Altmann Texas Corporation, an employer, manufacturing knitwear for interstate commerce at San Antonio, Texas. The complaint charged the employer with entering into an exclusive recognition agreement with the International Ladies' Garment Workers' Union, AFL-CIO, at a time when the union did not represent a majority of the corporation's employees in any appropriate bargaining unit. It also charged the employer with thus contributing to the support of the union in violation of § 8 (a)(2), and with interfering with the free exercise of rights, guaranteed to the employees by § 7 of such Act, in violation of § 8 (a)(1). In a separate complaint the General Counsel also charged that the union had violated § 8 (b)(1)(A) by entering into the above-mentioned agreement with the employer and thus restraining and coercing some of the latter's employees in the free exercise of rights guaranteed to them by § 7. After a hearing in which the cases were consolidated, the trial [fol. 222] examiner issued an intermediate report recommending that each complaint be dismissed in its entirety. However, the Board, on exceptions filed by the General Counsel, disagreed with the trial examiner's conclusions. The Board found that the employer and the union had respectively engaged in the alleged unfair labor practices. It accordingly ordered each of them to cease and desist from such practices and to hold a representative election. One member concurred in part and dissented in part. 122 N.L.R.B. 1289, 1297. The union now asks this Court to set aside the Board's order, whereas the Board asks that its order be enforced. Except for filing its answer, the employer has not participated in these proceedings.

The facts found by the Board are supported by substantial evidence on the record considered as a whole and are conclusive here. 61 Stat. 148, 29 U.S.C. § 160(e). Our jurisdiction is not questioned.

Beginning in 1956, the union engaged in a campaign to organize the employer's plant. It obtained a substantial number of authorization cards signed by employees designating the union as their bargaining representative. In July 1957, a number of the employees struck in protest against a wage reduction and the union, on behalf of some of the strikers, endeavored to settle the controversy. On August 30, 1957, during these negotiations, a "memorandum of understanding" was signed by the employer and the union. In that memorandum the employer expressly recognized the union as the exclusive bargaining agent for its production and shipping employees, and the union stated that it had been designated by a majority of such production and shipping employees to act as the exclusive bargaining representative of all of such employees. There was testimony that the union maintained a running check of the number of authorization cards it held against a list of the employees believed by it to be working in the bargaining unit. When the union's Regional Director be- [fol. 223] came convinced that the union had obtained cards from a majority of the workers in the unit, he so stated to the employer. The latter made no independent check of the cards and took no other steps to investigate the assertion. Likewise, there is no evidence that at the time of concluding the agreement the union attempted to obtain a definitive list of the employees within the proposed bargaining unit.

In October 1957, the memorandum was followed by a formal collective-bargaining agreement. This covered many subjects appropriate for such a contract and recited that a majority of the employees in the bargaining unit had designated the union as their exclusive bargaining representative. The Board found that, on the critical date of August 30, the union had not been designated as a bargaining agent, either by the votes or by the signed cards of a majority of the employees in an appropriate bargaining unit. The union disputes the Board's finding of lack of majority status on August 30. While there were questions raised as to the status of some employees, the Board was justified in the finding that the union did not represent a

majority of the employees in the designated unit on the critical date.[3]

The intent of the National Labor Relations Act, as amended, and especially of § 7, is that the decision whether or not to be represented by a bargaining representative and also the choice of that representative shall be the un- [fol. 224] coerced decision of a majority of the employees in an appropriate unit. Obstruction of that freedom of choice, by either the employer or the union, deprives some of the employees of this guaranteed right and is an unfair labor practice under § 8. It is difficult to conceive of a clearer restraint on the employees' right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees. If upheld, that action would foreclose any other choice of a bargaining representative by a majority of the workers in the unit. It would not only impose the minority's bargaining agent upon the nonparticipating majority, it would also practically preclude the majority, during the term of the contract, from casting off the union as bargaining representative. Even if the employees might surmount the difficulties inherent in challenging the established order by presenting a petition for decertification under § 9 (c),[4] it is quite likely,

---

[3] The union contends that although the August 30 memorandum may be invalid, the formal contract executed in October when the union had achieved majority status is valid. The fact that, by October, the union may have achieved a majority status during the period that it maintained an unlawful agreement is irrelevant. *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, 414, *reversing on other grounds* 105 App. D.C. 102, 107, 264 F. 2d 575, 580 (1959). See *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 703-705 (1944), and *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 372, 185 F. 2d 732, 744 (1950), cert. den., 341 U.S. 914 (1951).

[4] See *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938). "It [Congress in passing the NLRA] had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining . . . and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of the employees, and hence in preventing the recognition of any other."

under the Board's decisions, that the "contract-bar" rule would prevent the majority from asserting the union's lack of majority status during the two-year term of the contract. It has been held repeatedly by the Board that in a decertification proceeding, where the contract bar has been asserted, the petitioners are not permitted to show the lack of majority status of the union at the time the contract was made.[5]

[fol. 225] It has been repeatedly found an unfair labor practice under § 8(a)(1) and (2) for an employer to conclude a collective-bargaining agreement with a minority union.[6] In most of these cases there were aggravating factors such as the presence of a rival union or the imposition of a union security provision, but those cases do not appear to turn on the presence of these aggravating factors, nor are these factors always present. We see no material distinction from the viewpoint of the employees' § 7 organizational rights between the rival union situation, where there is interference in the choice between bargaining agents, and the instant cases, where the interference affects the choice whether to bargain through a collective representative or individually.

As early as *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), it has been recognized that im-

---

[5] See *In re Columbia River Salmon & Tuna Packers Assn.*, 91 N.L.R.B. 1424 (1950); *In re Electro Metallurgical Co.*, 72 N.L.R.B. 1396 (1947); *Sport Girl Co.*, 26 LRR Man. 1284 (1950); *In re Wilmington Terminal Warehouse Co.*, 68 N.L.R.B. 299, 302 (1946).

[6] See *e.g.*, *Dixie Bedding Mfg. Co.* v. *N.L.R.B.*, 268 F. 2d 901, 905 (C.A. 5th Cir. 1959); *District 50, United Mine Workers* v. *N.L.R.B.*, 234 F. 2d 565, 569 (C.A. 4th Cir. 1956); *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2d Cir. 1954); *N.L.R.B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, 782 (C.A. 2d Cir. 1954); *Elastic Stop Nut Corp.* v. *N.L.R.B.*, 142 F. 2d 371, 379-380 (C.A. 8th Cir. 1944), cert. den., 323 U.S. 722; *United Transports, Inc.*, CCH Lab. Law Rep. (4th ed. 1959) ¶ 56,192 (123 N.L.R.B. No. 60); *Grand Union Co.*, 122 N.L.R.B. 589; *Coast Aluminum Co.*, 120 N.L.R.B. 1326 (1958); *R. B. Wyatt Mfg. Co.*, 117 N.L.R.B. 700 (1957), aff'd *sub nom. N.L.R.B.* v. *Steel, Metals, Alloys, Local 810*, 253 F. 2d 832 (C.A. 2d Cir. 1958); *International Metal Products Co.*, 104 N.L.R.B. 1076, 1077 (1953); *John B. Shriver Co.*, 103 N.L.R.B. 23 (1953); *In re Ken-Rad Tube & Lamp Corp.*, 62 N.L.R.B. 21 (1945).

plicit in the duty of the employer to recognize the majority's representative of his employees as the exclusive bargaining representative is the correlative duty to deal with no agent other than that chosen by the majority. [fol. 226] Also implicit is the obligation on the part of the employer to make sure that the representative does in fact represent a majority of the employees. Conversely, it is the duty of those who seek to establish themselves as exclusive bargaining agents to make sure that they have the mandate of those in whose name they speak.

Section 8 (b)(1)(A), as enacted in 1947, prohibits unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8 (a)(1). That the provisions were intended to be parallel is indicated by the similarity of the language employed, and is confirmed by the legislative history of the provisions.[8]

Section 8 (a)(1), as it appeared in the original Wagner Act as § 8 (1), applied only to employer conduct. The major purpose which the sponsors of the 1947 amendments sought to achieve was to impose on unions the same restrictions as those imposed by § 8 (1) on employers respecting intrusion on protected employee activity. The omission of the word "interference" from subsection (b)(1) may not be devoid of significance when considering whether labor organizations are permitted wider latitude in peacefully persuading employees to organize than is

---

[7] See *North Electric Mfg. Co.* v. *N.L.R.B.*, 123 F. 2d 887, 889-890 (C.A. 6th Cir. 1941), cert. den., 315 U.S. 818 (1942); *Texarkana Bus Co.* v. *N.L.R.B.*, 119 F. 2d 480, 484 (C.A. 8th Cir. 1941); *N.L.R.B.* v. *Union Pacific Stages, Inc.*, 99 F.2d 153, 159 (C.A. 9th Cir. 1938); S. Rep. No. 573, 74th Cong., 1st Sess. 13 (1935).

[8] For expressions of intent that the two provisions establish comparable standards for employer and union conduct to those established for employer conduct by § 8 (1) see *e.g.*, the views of Senators Taft, Ball, Donnell and Jenner, S. Rep. No. 105, 80th Cong., 1st Sess. 50 (1947); statement of Senator Ball upon introducing § 8 (b)(1)(A) as an amendment, 93 Cong. Rec. 4016, and Senator Ball's further statements during debate, *id.*, at 4432-4433; Senator Taft in debate, *id.*, at 4025, 4436; remarks of Senator Smith, *id.*, at 4435.

permitted employers in opposing collective bargaining. [fol. 227] But where union activities go beyond the level of persuasion and amount to a foreclosure of the exercise of § 7 rights by the employees, we find no basis for holding that the provisions should have a different meaning when applied to a labor organization than when applied to an employer.

This Court's decision in *Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros.)* v. *N.L.R.B.*, —— U.S. App. D.C. ——, —— F.2d ——, decided November 26, 1958, and the Supreme Court's affirmance of that decision, 362 U.S. 274, do not militate against enforcement of the Board's order in the instant cases.[9] In the *Curtis Bros.* case a minority union was engaged in peaceful picketing in an effort to secure the recognition of a union which recently had been defeated in a certification election. This Court held that such picketing was not an unfair labor practice. The instant cases involve much more direct interference and restraint of § 7 rights than did the *Curtis Bros.* case. In the instant cases the recognition of the minority union is a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A).

The instant cases do not involve picketing and do not involve either the right of free expression or the right to strike which are protected by § 13 of the Act.[10] *Teamsters* [fol. 228] *Union* v. *Vogt, Inc.*, 354 U.S. 284 (1957); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The practices involved here, unlike recognitional and organizational picketing, are not specifically limited in the other unfair labor practice provisions of § 8.

---

[9] Since its decision in *Curtis Bros.* the Supreme Court has assumed in *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, that the conclusion of a collective-bargaining agreement by a minority union may be an unfair labor practice. See *id.*, at 414 and dissenting opinions at 429, 433.

[10] 61 Stat. 151.

An employer need not bargain with an uncertified representative if he has grounds in good faith for doubting the union's majority status,[11] but he is under a duty to bargain if he has adequate grounds for believing that the union does represent a majority.[12] It is difficult to establish ground for believing or disbelieving the existence of a majority status for a union in the face of a failure to take any steps to determine that status.[13]

The central consideration here is not merely whether the employer or the union entertained a bona fide belief that the union had majority support, but whether that belief was arrived at through an adequate effort to determine the true facts of the situation.

Questions may arise as to the membership of particular employees in the bargaining unit or the validity of the [fol. 229] union authorizations. In most of these situations clear and convincing proof of the employees' status will be readily available to the parties in the form of personnel records and other direct proof of employment status. If informal methods are not available, or they do not prove dispositive, § 9 (c) provides a formal method for an authoritative Board determination of majority representative status.

Organizational efforts will not generally turn on such thin majorities as to require a complex computation of majority status. In such a case, simple procedures are available to demonstrate majority status. It is only when

---

[11] *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F. 2d 365, 373 (C.A. 4th Cir. 1954); *A. L. Gilbert Co.*, 110 N.L.R.B. 2067 (1954); Administrative Decisions of the General Counsel, 5 CCH Lab. Law Rep. ¶¶ 56,470, 56,537, 56,548 (1959). The rule is otherwise where a labor organization has recently been certified by the National Labor Relations Board. *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).

[12] *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 369, 185 F. 2d 732, 741 (1950), cert. den., 341 U.S. 914 (1951).

[13] Failure to investigate a union's majority claim and bargain if it is substantiated is an unfair labor practice. *N.L.R.B.* v. *Inter-City Adv. Co.*, 190 F. 2d 420 (C.A. 4th Cir. 1951), cert. den., 342 U.S. 908 (1952); *N.L.R.B.* v. *Crown Can Co.*, 138 F. 2d 263 (C.A. 8th Cir. 1943), cert. den., 321 U.S. 769 (1944); *In re Metal Textile Corp. of Delaware*, 47 N.L.R.B. 743, 753 (1943).

the question is close that more is required. If the parties' determination of majority status is questionable, the burden is on the General Counsel to establish the alleged unfair practice and lack of majority status.

The net effect of the Board's policy is to require that labor organizations and employers refrain from recognizing by agreement a sole bargaining representative until such time as they have adequately established that such agent represents a majority of the employees in the bargaining unit. Allowing the union or the employer to do otherwise would permit them, by agreement, to undermine the employees' rights under § 7.

Accordingly, the union's petition to set aside the order is denied and the Board's order shall be enforced in full.

FAHY, Circuit Judge, dissenting: The doubts which surrounded the problem presented by this case have been resolved, as it seems to me, by the necessary implications of the recent decisions of the Supreme Court in *NLRB* v. *Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274, referred to as the *Curtis* case, and *United Rubber Workers* v. *NLRB*, 362 U.S. 329. The Court held in these cases that peaceful picketing, or a peaceful strike, by a union which [fol. 230] did not represent a majority of the employees, to obtain immediate recognition as the exclusive bargaining agent in *Curtis*, or to obtain a contract in *United Rubber Workers*, was not an unfair labor practice under section 8(b)(1)(A) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 141-66 (1958). The subject was exhaustively considered in *Curtis*. In the absence of an objective explicitly condemned by the Act, such as appears in section 8(b)(4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8(b)(1)(A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provision, is not an unfair labor practice on the part of the union under section 8(b)(1)(A). Insofar, therefore, as the

Board order rests upon recognition thus accorded I think it is not supported.

I believe it also follows that the employer on his part does not violate section 8(a)(1) or section 8(a)(2) by according such recognition or entering into such an agreement. There was no rival union competing for recognition. Moreover, the employer was not interfering with the freedom of the employees by conferring exclusive recognition in furtherance of the employer's own preference for or desire to assist one union over another. Nor was the contract one for a union shop, see *Local Lodge No. 1424* v. *NLRB*, —— U.S. ——, (28 U.S. L. Week 4274, April 26, 1960), or claimed to be unlawful except that it accorded exclusive recognition to the union.[1] The strike was a peaceful one by the only union seeking recognition and bargaining status. The union lawfully obtained the settlement. It would frustrate the [fol. 231] union's right so to do were it to be held that the employer, in agreeing to such a settlement, engaged on its part in an unfair labor practice which invalidated the settlement reached. Moreover, it seems to me that the contrary position requires an employer to suffer the consequences of a lawful strike without being able lawfully to bring it to an agreed end unless and until the union gains the adherence of a majority of the employees.

My position does not mean that the recognition in the form given is protected should a majority of the employees at any time repudiate the union or choose another bargaining agent. On the contrary, any existing "contract bar" policy or regulation of the Board is I think inapplicable to such a contract with a minority union, though made in such circumstances as are presented by this case.

I would set aside the order of the Board.

---

[1] The Board decision does not rest to any extent upon any other provision in the contract. I treat the case on the same basis.

[fol. 232] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,038

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 15,079

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BERNHARD-ALTMANN TEXAS CORPORATION, Respondent.

On Petition to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Mr. Justice Burton, retired, and Wilbur K. Miller and Fahy, Circuit Judges.

JUDGMENT—May 19, 1960

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

On Consideration Whereof, it is ordered by this court that the petition of International Ladies' Garment Workers' Union to set aside the order of the National Labor Relations Board is denied; and the order of the National Labor Relations Board will be enforced in full.

Pursuant to Rule 38(1), the National Labor Relations Board shall within 10 days hereof serve and file a proposed

enforcement decree consistent with the opinion and judgment of this court.

Per Mr. Justice Burton.

Dated: May 19, 1960.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 233] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 234]

SUPREME COURT OF THE UNITED STATES

No. 284, October Term, 1960

INTERNATIONAL LADIES' GARMENT WORKERS' UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD ET AL.

ORDER ALLOWING CERTIORARI—October 10, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MORRIS P. GLUSHIEN,
1710 Broadway
New York 19, New York

CHARLES J. MORRIS,
1601 National Bankers
Life Building
Dallas 1, Texas

L. N. D. WELLS, JR.,
1601 National Bankers
Life Building
Dallas 1, Texas

RUTH WEYAND,
1346 Conn. Ave., N. W.
Washington 6, D. C.

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Reasons for granting the writ	11
Conclusion	27
Appendix A—Statutes involved	1a
Appendix B—Judgment of the United States Court of Appeals for the District of Columbia Circuit	10a
Appendix C—Opinion of the United States Court of Appeals for the District of Columbia Circuit	11a
Appendix D—Dissenting Opinion of Circuit Judge Charles Fahy in the United States Court of Appeals for the District of Columbia Circuit	21a

CITATIONS

CASES:

Alco-Gravure, Division of Publications Corp., 124 N.L.R.B. No. 141	20
American Steel Foundries v. *Tri-City Central Trades Council*, 257 U.S. 184	14
Automotive Supply Co., 119 N.L.R.B. 1074	21
Black Diamond S.S. Corp. v. *N.L.R.B.*, 94 F. 2d 875, certiorari denied, 304 U.S. 579	14
Cleveland Worsted Mills Co., 42 N.L.R.B. 545	14
Columbia Pictures Corp., 64 N.L.R.B. 490	15
Consolidated Builders Inc., 99 N.L.R.B. 972	20
Consolidated Edison Co. v. *N.L.R.B.*, 305 U.S. 197	17, 18, 19
Curtis Brothers, Inc., 119 N.L.R.B. 232	9
Max Factor & Co., 118 N.L.R.B. 808	19
Herff Jones Co., 97 N.L.R.B. 1070	20

	Page
Hoover Co., 90 N.L.R.B. 1614	20
Jandel Furs, 100 N.L.R.B. 1390	20
Joy Silk Mills, Inc. v. *N.L.R.B.*, 185 F. 2d 732, certiorari denied, 341 U.S. 914	21
Machinists Local v. *N.L.R.B.*, 362 U.S. 411	17
Merchandiser Press, Inc., 115 N.L.R.B. 1441	21
Miami Copper Co., 92 N.L.R.B. 322	12, 13
N.L.R.B. v. *Brashear Freight Lines, Inc.*, 119 F. 2d 379	15
N.L.R.B. v. *Drivers Local Union*, 362 U.S. 274	9, 10, 11, 12, 15, 16
N.L.R.B. v. *Guynor News Company, Inc.*, 197 F. 2d 719, affirmed, 347 U.S. 17	20, 24
N.L.R.B. v. *W. T. Grant Co.*, 199 F. 2d 711, certiorari denied, 344 U.S. 928	21
N.L.R.B. v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821	
Newark Newsdealer Supply Co., 94 N.L.R.B. 1667	20
Puerto Rico S.S. Ass'n v. *N.L.R.B.*, 46 L.R.R.M. 2496	26
E. M. Reeves & Sons, Inc., 121 N.L.R.B. 1280	21
H. Rothstein & Co., Inc., 120 N.L.R.B. 1556	21
Seaboard Terminal, 114 N.L.R.B. 1391	20
Sierra Furniture Corp., 123 N.L.R.B. 1198	22
Stratbury Mfg. Co., 12 N.L.R.B. 618	23
Sunbeam Corp., 98 N.L.R.B. 546	20
Top Mode Mfg. Co., 97 N.L.R.B. 1273, enforced 203 F. 2d 482	21
United Butchers Abbatoir, Inc., 123 N.L.R.B. 946	21
United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62	21
United Rubber Workers v. *N.L.R.B.*, 362 U.S. 274	11, 16

STATUTES:

National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*

Section 1	1a
Section 2 (3)	14, 2a
Section 2 (9)	13, 14, 3a
Section 7	3a
Section 8 (a) (1)	2, 7, 8, 13, 15, 3a
Section 8 (a) (2)	2, 7, 8, 15, 3a
Section 8 (a) (3)	7, 13, 4a

Page

Section 8 (a) (5) 13, 4a
Section 8 (b) (1) 2, 7, 8, 11, 12, 13, 15, 5a
Section 8 (b) (4) 5a
Section 8 (c) 6a
Section 9 (a) 6a
Section 9 (b) 6a
Section 9 (c) 7a
Section 9 (e) 8a
Section 10 (c) 9a
Section 13 ..... 9a

CONGRESSIONAL MATERIAL:

H. Rep. No. 1147, 74th Cong., 1st Sess., II Leg. His., N.L.R.A., 1935, pp. 3056-3057 14

MISCELLANEOUS:

Annotation: Unfair labor practices: discrimination between union members and non-members as to wage increases, vacations and the like, 41 A.L.R. 2d 654 20

B.L.S. Bulletin No. 1267, Director of National and International Labor Unions, 1959 (Govt. Print. Off., 1959), p. 15 16

Bureau of National Affairs, Minority Union's Execution of Contract as Unlawful Coercion Under Taft-Hartley Act, 46 BNA Analysis 17 (May 30, 1960) 24

N.L.R.B. Seventh Annual Report, 1942 (Govt. Print. Off., 1942) 23

N.L.R.B. Seventeenth Annual Report, 1952 (Govt. Print. Off., 1952) 20

Note: Restraint and Coercion: Execution of a Collective Bargaining Contract by a Minority Union, 1959 Duke Law Journ. 624 (Fall 1959) 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The International Ladies' Garment Workers' Union, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled case on May 19, 1960.

OPINIONS BELOW

The opinion of the court below (Appendix C, *infra*, pp. 11a-20a) and the dissenting opinion of Circuit Judge Charles Fahy (Appendix D, *infra*, pp. 21a-22a) are not yet reported. The findings of fact, conclusions

of law and order of the National Labor Relations Board (R. 7-22)[1] and the dissenting opinion of Board Member John H. Fanning (R. 22-27) are reported at 122 N.L.R.B. 1289.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 10a) was entered on May 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether settlement of a strike by exclusive recognition of a union in the good faith but mistaken belief that the union had been designated by a majority of the employees in an appropriate unit, is an unfair labor practice by the employer under Section 8 (a) (1) and (2) and by the union under Section 8 (b) (1) (A) of the National Labor Relations Act.

2. Even if Question 1 is answered in the affirmative, whether the collective bargaining agreement entered into subsequent to the settling of the strike and at a time the union had unquestionably been designated by a majority of the employees in an appropriate unit, can properly be held by the Board to be unenforceable by the union and the Board can properly order the employer to withdraw and withhold recognition from the union and the union to cease acting as a collective bargaining representative of any of the employees until it has won a Board conducted election, all solely because of the union's failure to have been designated by a majority when the strike was settled.

---

[1] "R." references are to the Joint Appendix filed in the Court of Appeals.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 1a-9a.

STATEMENT

Bernhard-Altmann Texas Corporation, hereinafter called the Employer, is a Delaware corporation, which is engaged in the manufacture of knit wear at San Antonio, Texas (R. 36-37). In the fall of 1956 its employees began signing authorization cards in the International Ladies' Garment Workers' Union, AFL-CIO, hereinafter called the Union (R. 9, 36; 141-146).[2] In varying numbers employees from October, 1956, to September, 1957, signed cards designating the Union as their representative for purposes of collective bargaining (R. 36; 141-146). No other labor organization was involved in organizing or seeking to represent these employees (R. 37). At all times prior to August 30, 1957, "the Employer vigorously opposed the Union's efforts," and its employees were aware of this opposition (R. 37; 100).

On July 29, 1957, a substantial number of employees went on strike against the Employer because of a wage reduction in the Topping Department (R. 9, 37; 89). Many of the strikers had signed union authorization cards, although some card signers did not participate in the strike, and during the progress of the strike other employees, both strikers and non-strikers, continued to join the Union (R. 62-63, 68-71, 135-136, 141-146).

---

[2] References preceding the semicolon are to the Board's findings, including the findings of the Trial Examiner which were adopted by the Board; succeeding references are to the supporting evidence.

During the last week of August, 1957, conferences between representatives of the Employer and the Union, to settle the strike, were held in New York City where the home offices of both the Employer and the Union are located, (R. 9, 37; 91-94). The Employer representatives did not have any copies of the payroll in New York City (R. 66-67, 139). However, on at least two occasions Employer representatives advised the Union "of the number of people whom (sic) they determined would be working for them or eligible to join the union" (R. 94). The exact dates on which this occurred and the number so stated do not appear in the record. At the hearing many months later, it was established that the Employer's payroll for the week ending August 31, 1957 showed 286 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors" (R. 11, 42; 59-60, 65, 129-133). Seven of these 286 were probationary employees on that date (R. 90-91). Some 25 others had been hired during the strike and Employer representatives in New York City assured the Union these were solely temporary (R. 42; 97-100). At this time there were also an undetermined number of employees in lay off status, with the maximum in this group 120, although to the extent that these persons had secured other permanent employment they would not be considered still employees of the company (R. 42; 63-64, 135-136).

The Union representatives had with them in New York City the cards signed by employees authorizing the Union to represent them (R. 92-93). These cards were turned over to the Union's attorney, Morris Glushien, who was then engaged in conferences with Leo Guzik, Employer counsel (R. 92-94). By August

30, 1957 the Union had received 186 cards, all of which were admittedly genuine and valid (R. 68-72, 141-146), although it later turned out that 28 of these cards were signed by employees who were not current employees in the bargaining unit on August 30, 1957 (R. 68-72, 146).

On or about August 30, 1957, in the course of settlement conferences the Union stated to the Employer that it had been designated by a majority of the employees and requested recognition and bargaining rights (R. 94). The Employer agreed to recognize the Union and settle the strike. Both the Union, in making the claim of majority on August 30, and the Employer, in accepting the claim, acted upon the honest and reasonable belief that this claim was true, as the Trial Examiner and Board later found (R. 12, 43-44; 95).

The Employer and the Union executed a short informal written "memorandum of understanding" on August 30, 1957, reciting that the strike was terminated, that the Employer "recognizes the Union as the exclusive bargaining agent for all production and shipping employees," that all striking employees shall return to work without discrimination, that certain improved wages and conditions of employment were granted and that "formal agreement containing these terms" will "be promptly drafted by the attorneys and signed by both parties within the next two weeks" (R. 9, 37; 103-104). There was no mention of any requirement of union membership or any form of union security.

On October 10, 1957, the Employer and the Union executed a formal collective bargaining contract, embodying the terms reached in the strike settlement

(R. 9, 38; 72, 105-127). This contract did not contain any form of union security clause. In this contract the parties for the first time delineated precisely the bargaining unit for which the Employer recognized the Union (R. 97). The contract in this regard provides (R. 106):

> "The bargaining unit covered by this agreement consists solely of all non-supervisory production and shipping department workers employed by said Employer, excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors."

On October 10, 1957, the date upon which the formal collective bargaining contract was executed (R. 72), the Union had been designated as their collective bargaining representative by a majority of the employees in the unit described in the contract (R. 39).[3]

Thereafter charges were filed and a complaint issued alleging that the Employer had committed unfair labor

---

[3] The Board made no finding as to how many were in the appropriate unit on either August 30 or October 10. The largest possible number of employees in the agreed upon unit on October 10 could not have exceeded 383, although it was undoubtedly even smaller because of the uncertainty of the various lists which the General Counsel introduced. Assume the maximum from these lists as follows: 287 from G.C. Ex. 4 (R. 59-61, 65-66, 73, 129-133), 120 from G.C. 5 (R. 62-64, 73-74, 135-136), and 12 from the stipulation (R. 71-73). From this, 36 must be subtracted to account for those whom it was stipulated had terminated (R. 100-102). A further deduction should be made to eliminate the 25 temporary employees hired during the strike (R. 42; 97-100) although some of these are probably duplicated in the list of 36 terminations. Even without such further reduction the unit would contain 383, of which the Union had a clear majority of 211 (R. 68-71, 141-146).

practices in violation of Section 8 (a) (1), (2) and (3) of the National Labor Relations Act and that the Union had committed unfair labor practices in violation of Section 8 (b) (1) (A) and (2) of that Act (R. 34). After the usual proceedings the Trial Examiner issued his Intermediate Report dismissing the complaint in its entirety (R. 34-48). The Trial Examiner pointed out that the General Counsel had neither alleged nor defined the appropriate unit on August 30, 1957 (R. 40) and that "the record provides no reasonable basis for other than a number of speculative possibilities, both as to what an appropriate unit was on August 30, 1957, and as to precisely how many employees were properly to be counted within any or all of these possible units" (R. 44). The Trial Examiner also found that "all" of the evidence "leads to the reasonable conclusion that both parties were acting in good faith on August 30: the Union in claiming majority, and the Employer in accepting the claim" (R. 43) and that "the Employer and the Union entered into the August 30 memorandum of understanding in good faith" (R. 44).

Upon exceptions filed by the General Counsel, the Board held that it was not necessary to determine what the appropriate unit was on August 30, 1957 nor how many employees were in the unit on that date (R. 10-12), because judged by the standards of the unit which the parties agreed upon in their October 10, 1957 contract, however employees in that unit were counted on August 30, 1957, and however union membership cards were counted, the Union did not have a majority in that unit on August 30, 1957 (R. 10-13). The Board determined that, solely because of such assumed lack of majority, the Employer by entering

into the strike settlement with the Union on August 30, 1957 interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) and contributed support to the Union in violation of Section 8 (a) (2) of the Act (R. 12-13) and the Union restrained and coerced employees in volation of Section 8 (b) (1) (A) of the Act (R. 13-14).[4] The Board ruled that the good faith of the Employer and the Union was immaterial (R. 10, 12).

As a remedy for these unfair labor practices the Board entered an order directing the Employer and the Union to cease and desist from the unfair labor practices found (R. 17-21). The Employer was also ordered to cease giving effect to the "memorandum of understanding" dated August 30, 1957 and to the collective bargaining agreement executed October 10, 1957, to cease and desist from recognizing the Union "as the representative of any of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment" and to withdraw and withhold recognition from the Union as the exclusive bargaining representative of its employees until the Union shall have won a Board-conducted election (R. 18-19). With respect to the Union, while the Board in stating what remedy it regarded as necessary, announced that it would order the Union to cease and desist from acting as the "collective bargaining representative of any of the Company's employees unless and until" it won a Board election (R. 16-17),

---

[4] There were no other acts of unfair labor practices found. All allegations of individual acts of coercion were dismissed (R. 15-16, 46-48). The violations were thus based entirely on the act of recognition and execution of the agreements (R. 15-16).

the order by its terms was narrower in that the Union was ordered to cease and desist from acting as the "exclusive bargaining representative" until it shall have won a Board-conducted election and to cease giving effect to the "memorandum of understanding" of August 30, 1957 and the collective bargaining agreement executed October 10, 1957 (R. 20). The Board however stated in its decision that nothing therein should be construed as requiring the Employer to vary any wage, hour, seniority, or other substantive feature of its relations with its employees which the Employer has established in performance of its contracts with the Union (R. 16-17), or "prejudice the assertion by employees of any rights they may have thereunder" (R. 16-18).

Board Member John H. Fanning dissented from the finding of the majority of the Board "that the Union's acceptance of recognition by the Employer in a contract establishing higher wages and better working conditions for the employees constitutes restraint or coercion of these employees within the meaning of Section 8 (b) (1) (A)" (R. 23). Relying upon his earlier expressed disagreement with the majority of the Board in the case of *Curtis Brothers, Inc.*, 119 N.L.R.B. 232, which dissenting views were adopted by this Court in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, Board Member Fanning stated that if picketing or a strike for recognition by a minority union did not violate Section 8 (b) (1) (A) of the Act, neither could an "employer's *voluntary recognition* of a minority union impose upon that union an unfair labor practice solely on the ground that it *accepted* recognition" (R. 24-25). (Italics Board Member Fanning's.) Board Member Fanning concluded (R. 25-26):

> "Here was a union that fought hard to secure substantial benefits from a reluctant employer *in a contract that did not require any employee to be or become a member of the Union.* * * * It seems to me the majority tilts at windmills in holding that the bona fide attempt of a minority union to secure substantial benefits for employees through collective bargaining amounts to unlawful restraint or coercion. I see no wrong doing here and would not fashion an unfair labor practice out of mere error in statistics." (Italics Board Member Fanning's.)

Upon petition by the Union filed in the court below to review and set aside the Board's order, the court below by a two to one decision, with Circuit Judge Charles Fahy dissenting, directed enforcement (Appendices C and D, pp. 11a-22a, *infra*). The majority of the court below distinguished this Court's decision in the *Curtis* case (*N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274), stating (Appendix C, *infra*, pp. 18a-19a):

> "In the instant case the recognition of the minority union is a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of Section (8 (b) (1) (A).
>
> "The instant cases do not involve picketing and do not involve either the right of free expression or the right to strike which are protected by Section 13 of the Act. * * * The practices involved here, unlike recognitional and organizational picketing, are not specifically limited in the other unfair labor practice provisions of §8."

Circuit Judge Charles Fahy deemed that the decisions of the Court in the *Curtis* case and in *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 329 were dispositive of the case and required that the Board's order be set aside in its entirety. Referring to the *Curtis* case, Circuit Judge Fahy stated (Appendix D, *infra*, p. 21a):

> "In the absence of an objective explicitly condemned by the Act, such as appears in section 8 (b) (4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8 (b) (1) (A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provisions, is not an unfair labor practice on the part of the union under section 8 (b) (1) (A). * * *
>
> "I believe it also follows that the employer on his part does not violate section (8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement."

The court below on May 19, 1960, entered a judgment enforcing the Board's order in full (Appendix B, *infra*, p. 10a).

REASONS FOR GRANTING THE WRIT

1. The decision below fails to follow the applicable principles of law enunciated by the Court in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, commonly known as the *Curtis* case, and in *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 274. This Court's holding that Section 8 (b) (1) (A) does not bar strikes or picketing for recognition of a minority union must necessarily

mean that this section does not bar peaceful acceptance of recognition by a minority union. This Court in the *Curtis* case reached its decision by examining the legislative history of Section 8 (b) (1) (A) and determining that the objectives which Congress had in mind in enacting this section did not encompass such a result as barring peaceful measures taken by a minority union to achieve recognition. This Court there said (362 U.S. at p. 290):

> " * * * Section 8 (b) (1) (A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof. * * *"

A peaceful request of a union for recognition followed by the signing of a contract when the employer agrees to grant recognition can by no stretch of the imagination be classified as "violence, intimidation, and reprisal or threats thereof." If anything, such claim making and contract signing are much further removed from the type of conduct to which Section 8 (b) (1) (A) is directed than are strikes and picketing for recognition.

This Court in its decision in the *Curtis* case listed various Board decisions during the first decade after the passage of the Taft-Hartley Act, which gave Section 8 (b) (1) (A) the "limited application" which this Court characterized as "a sounder construction" of Section 8 (b) (1) (A) than the Board's construction in the *Curtis* case (362 U.S. at 290-291). In one of the cases so cited by this Court, *Miami Copper Co.*, 1950, 92 N.L.R.B. 322, 324, the Board dismissed a complaint alleging that a minority union had violated Section 8 (b) (1) (A) by striking and compelling the employer to deal with it in the adjustment of griev-

ances in derogation of the rights of the majority union. The Trial Examiner in the *Miami Copper* case found that the employer violated Section 8 (a) (1) and (5) by dealing with the minority union. The Board sustained this finding without passing on its validity solely because the employer failed to file exceptions (92 N.L.R.B. at 324). In dismissing the Section 8 (b) (1) (A) allegations the Board said (92 N.L.R.B. at 324):

> "Where the union's conduct involved violence, threats thereof, or related conduct, or where the union had obtained or was attempting to obtain economic discrimination against particular employees, we have found such conduct proscribed by Section 8 (b) (1) (A). No such factors are present here. Standing alone, the fact that the Union's conduct caused the Employer to violate a statutory right of the employees is not sufficient, in our opinion, to bring that conduct within the limitations which the legislative history requires we place on Section 8 (b) (1) (A)."

The decision below is inconsistent with this Court's approval of the Board's construction of Section 8 (b) (1) (A) in the *Miami Copper* case.

Prior to the enactment of the Wagner Act, employers and unions had been free to enter into collective bargaining contracts without any requirement that the union have been designated by a majority of the employees. The Wagner Act was directed solely at extending labor's rights. While it required an employer to bargain with the union designated by the majority, it contained no restraint on arm's length bargaining between an employer and a union with less than a majority. The legislative history of Section 2 (9) of that Act, which in this regard still remains

unchanged, and which defines a labor dispute to include controversies concerning the negotiating or fixing of terms or conditions of employment "regardless of whether the disputants stand in the proximate relation of employer and employee," shows congressional approval of minority union recognition.[5]

In the cases decided under the Wagner Act, many of the strikers whom the Board ordered reinstated had been participants in strikes conducted by minority unions seeking recognition. *E.g., Cleveland Worsted Mills Co.*, 1942, 42 N.L.R.B. 545. In *Black Diamond S.S. Corp. v. N.L.R.B.*, 2 Cir., 1938, 94 F. 2d 875, certiorari denied, 304 U.S. 579, while an election was being held by the Board to determine which of two rival unions represented a majority of the men, one of the unions demanded that the company bargain with it. The demand was ignored and the union called a strike. The court held that the men had a right to strike and that the strike did not prejudice their right to rein-

[5] In House Report No. 1147, 74th Cong., 1st Sess., pp. 9-10 (II Leg. His. N.L.R.A., 1935, pp. 3056-3057), on the original Wagner Act, the discussion of the definitions set forth in Section 2(3) and (9) states: "The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee * * *." The committee then proceeded to cite *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, thus indicating an intent to guarantee the right of minority unions to picket for the purpose of changing wages and working conditions. The *American Steel Foundries Case* involved a Trades Council which represented less than a majority of the employees. The Council sought negotiations with the employer after wages were cut from 2 cents to 10 cents per hour. The manager of the company responded that he "did not recognize organized labor and would not deal with the committee * * *" (257 U.S. 196). Thereupon the Council called a strike and picketed the company.

statement. See also to the same effect *Columbia Pictures Corp.*, 1945, 64 N.L.R.B. 490, 510-515. In no case decided under the Wagner Act did the Board or the courts find that such an objective made the conduct of the strikers illegal[*] or that an employer, in the absence of a rival union, or other employer favoritism, committed an unfair labor practice by recognizing a minority union and bargaining with it at arm's length. Nor have we been able to find in the legislative history of the Taft-Hartley Act, which in this regard was fully reviewed by this Court in the *Curtis* case, any indication that Congress by its enactment of Section 8 (b) (1) (A) intended to deal with this problem.

In the instant case both Board Member Fanning (R. 23-27) and Circuit Judge Fahy (Appendix D, p. 21a) pointed out that a construction of Section 8 (b) (1) (A) as not directed at peaceful economic measures, such as was adopted by this Court in the *Curtis* case, precludes a finding such as the Board made here, that recognition of a minority union violates Section 8 (b) (1) (A) of the Act. Moreover as Circuit Judge Fahy stated (Appendix D, *infra*, pp. 21a-22a), the holding by this Court that a strike and picketing for recognition of a minority union does not restrain and coerce employees in the exercise of their rights guaranteed by Section 7, makes it equally impossible to find that an employer by according such recognition violated either Section 8 (a) (1) or (2) of the Act.

---

[*] In *N.L.R.B.* v. *Brashear Freight Lines, Inc.*, 8th Cir., 1941, 119 F. 2d 379, 382, the court however found no basis for reinstating such strikers where the employer had not committed any unfair labor practices which provoked the strike and had not been guilty of discrimination in failure to rehire the strikers. The court did not explain its reasoning.

Circuit Judge Fahy was General Counsel of the National Labor Relations Board from its inception in 1935 until 1940 when he resigned and shortly thereafter became first Assistant Solicitor General of the United States, and later Solicitor General of the United States. In all of these capacities, as well as in his capacity as a judge of the United States Court of Appeals for the District of Columbia Circuit, Circuit Judge Fahy has had a very close association with the interpretation and administration of the National Labor Relations Act. His view that neither the union nor the employer was here guilty of any unfair labor practice is entitled to great weight.

This Court should review the decision below in order to correct the failure to follow the decisions of this Court in the *Curtis* and *Rubber Workers* cases.

2. The issue presented is of far reaching importance to industry and labor. There are more than 150,000 collective bargaining contracts currently in effect in the United States, according to the most recent estimates of the Bureau of Labor Statistics.[7] It is safe to state that only a small fraction[8] of these are with

---

[7] BLS Bull. No. 1267, Directory of National and International Labor Unions in the United States, 1959 (G.P.O. December 1959), p. 15.

[8] The Statistical Analysis Branch of the National Labor Relations Board keeps cumulative statistics on the number of unions which have won Board conducted elections and has supplied us with the information that from the inception of the Board in 1935 through June 30, 1959, there were 72,336 Board conducted elections won by unions. Neither the Board nor the Department of Labor has any figures as to how many of these elections were won by the same union year after year nor how many unions in all are today certified nor how many contracts are with certified unions. The vast bulk of these 72,336 elections were conducted many years ago and the certifications issued therein are now obsolete.

certified unions. Employers and uncertified unions will in the future be hesitant to enter into collective bargaining agreements if their *bona fide* determination of union majority can be upset by the Board should they have made a mistake in the complicated process of determining inclusions and exclusions from the appropriate bargaining unit. Increased instability in labor relations must necessarily result if the more than a hundred thousand employers and union who are today parties to contracts where there is no certification should suddenly become aware of the possible consequences of renewing agreements without certification of the union. The decision below forces them to be certain not only of the union majority at the time of renewal but also that there was a union majority when the prior contract was signed, unless the events incident thereto have been barred by the statute of limitations. *Cf. Machinists Local* v. *N.L.R.B.*, 362 U.S. 411, 425-426.

Especially in strike situations, the decision below, if not reviewed and set aside, will make it difficult if not impossible to settle many strikes. The parties may not wish to resort to the election process and even if they wish to, the delays which attend petitions for Board conduct of elections would certainly greatly lengthen strikes should the parties be placed at their peril in signing a settlement agreement without Board certification.

Even where no strike was in progress, this Court has recognized that the policy of encouraging prompt signing of contracts in order to avoid strikes, is so strong, that the delay incident to waiting for a Board-conducted election should not be permitted in the absence of compelling reasons. In *Consolidated Edison Co.* v.

N.L.R.B., 1938, 305 U.S. 197, 237, in setting aside a Board order which invalidated contracts made with an uncertified union and holding that they should be permitted to continue in effect as members-only contracts, this Court said:

> "there is nothing to show that the employees' selection as indicated by the Brotherhood contracts had been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree . . . The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of the employees, would remove that salutary protection during the intervening period.
>
> "The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency . . . did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf."

The effect of the rule enunciated below to discourage collective bargaining has been described and discussed in a note on the Board's decision in this case entitled: Restraint and Coercion: Execution of a Collective Bargaining Contract by a Minority Union, 1959 Duke

Law Journ. 624, 627-629 (Fall 1959). The author of that note states (at pp. 627-628):

> "This decision also involves federal labor policy considerations which indicate that a different rule might be more desirable. It seems fair to say that the decision could have the effect of discouraging the signing of collective bargaining contracts because it required a union act therein at its peril, good faith being expressly excluded as a defense. A union may be faced with serious difficulty in ascertaining the exact number of employees in a bargaining unit. . . . Furthermore, should the employer be negligent in supplying the union with the correct number of employees in a bargaining unit from the payroll records, the union, under the rule in the instant decision must share the risk of committing an unfair labor practice.
>
> "All of these considerations may discourage unions from signing collective bargaining contracts because none of these circumstances would be considered a legitimate defense and because the necessity of making a determination of majority status would cause delay at the most critical point in negotiations—just prior to signing." (footnotes omitted)

The dilemma posed for employers and unions by the rule of the decision below is not soluble under present Board doctrine. At one time a union and an employer, faced with uncertainty as to the majority status of a union, could safely sign a members-only contract. Compare *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U.S. 197, 236. But it is dubious if any members-only contract is ever valid under present Board doctrine. In *Max Factor & Co.*, 1957, 118 N.L.R.B. 808, 813, the Board pointed out that the General Counsel took the position that a members-only contract is *per se* violative of the Act. The Board there found it unnecessary

to pass on the issue, as the members-only contract there had been preceded by an unlawful union security contract. In its order, however, the Board did forbid recognition "even limited to its members" until the union should win a Board-conducted election.

It is today settled that a members-only contact with a majority union is illegal because it violates the duty of a majority union to represent all employees.[9] A members-only contract even with a minority union is illegal if it provides different benefits for union than for non-union members,[10] whereas the provisions in a contract, which recited it was for members only, of the same provisions for all employees, has been held to show that the contract was actually an exclusive recognition contract.[11]

---

[9] See *N.L.R.B.* v. *Gaynor News Company, Inc.*, 2d Cir., 1953, 197 F. 2d 719, 722 where the court said: "The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation." This language was quoted with approval by this Court in affirming that decision, 347 U.S. 17, 37-38.

[10] *Newark Newsdealer Supply Co.*, 1951, 94 N.L.R.B. 1667, 1668-1669; Annotation: Unfair labor practices; discrimination between union members and non-members as to wage increases, vacations and the like, 41 ALR 2d 654, 655-656, § 2. In general; where union bargains for its members only; *Jandel Furs*, 1952, 100 N.L.R.B. 1390, 1392-1393; *Seaboard Terminal*, 1955, 114 N.L.R.B. 1391, 1396.

[11] *Herff Jones Co.*, 1952, 97 N.L.R.B. 1070, 1071-1072; *Sunbeam Corp.*, 1952, 99 N.L.R.B. 546; *Alco-Gravure, Division of Publications Corp.*, 124 N.L.R.B. No. 141, enforced by consent, 6th Cir., 1959, 45 LRRM 2899. For the limited validity which members-only contracts have been given by the Board, see *The Hoover Company*, 1950, 90 N.L.R.B. 1614, 1618; *Consolidated Builders, Inc.*, 1952, 99 N.L.R.B. 972; 17th NLRB Annual Report, 1952, p. 124.

This Court has repeatedly recognized that Congress intended to encourage employers and unions to enter into collective bargaining agreements without first having to come to the Board to have it determine a unit and conduct an election. *Cf. United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 74-75. Indeed, the Board and the courts have always held that any employer who had a *bona fide* belief in the union's majority committed an unfair labor practice by refusing to accord exclusive recognition and insisting on a Board-conducted election.[12] The employer may not even insist on proof of the union's majority, unless the employer has reason to doubt it. In *Automotive Supply Co.*, 1957, 119 N.L.R.B. 1074, 1094-1095, the Board held:

> "Respondent contended that the Union had a duty to prove its majority to the Company. This would be true only if the Company had any good faith doubt which it did not have."

We believe that bargaining without recourse to Board proceedings is in accordance with the policy of the statute to encourage collective bargaining. The instant case, however, is inconsistent. It prevents employees and unions from bargaining without risking either unfair labor practice charges or the delay involved in Board-conducted elections.

---

[12] *United Butcher Abattoir, Inc.*, 1959, 123 N.L.R.B. 946, 957; *F. M. Reeves & Sons, Inc.*, 1958, 121 N.L.R.B. 1280; *Merchandiser Press, Inc.*, 1956, 115 N.L.R.B. 1441, 1448-1449; *H. Rothstein & Co., Inc.*, 1958, 120 N.L.R.B. 1556; *Top Mode Mfg. Co.*, 1952, 97 N.L.R.B. 1273, enforced, 3 Cir., 1953, 203 F. 2d 482; *N.L.R.B.* v. *W. T. Grant Co.*, 9th Cir., 1952, 199 F 2d 711, certiorari denied, 344 U.S. 928; *Joy Silk Mills, Inc.* v. *N.L.R.B.*, D.C. Cir. 1950, 185 F. 2d 732, 741, enforcing 85 N.L.R.B. 1263, 1264-1265, certiorari denied, 341 U.S. 914; *N.L.R.B.* v. *Idaho Egg Producers, Inc.*, 9th Cir., 1956, 229 F. 2d 821.

To make the validity of bargaining relationships depend upon the actual existence of a proveable majority, encourages employer trickery. To settle a strike, the employer can represent his payroll at a low figure and once the strike is settled, upset the settlement by revealing a larger number of employees in the unit. *Cf. Sierra Furniture Co.*, 1959, 123 N.L.R.B., 1198, 1211.

3. The settlement of strikes by genuine agreements providing increased wages and improved working conditions is beneficial to all employees whether union members or not. Where the employer has been fighting the union, and despite the employer's opposition, so many employees join the union that both employer and union believe the union has majority status, there can be no element of restraint or coercion of non-union employees. Nor in either the eyes of the employer or the employees is the recognition viewed as support to the Union. Rather it is nothing more than what the employer and the union believe is legally due. The grant of only what is legally due is not support. If the non-union employees are unhappy at being represented by the union and doubt its actual majority, they can petition the Board for decertification or join another union and have it file a petition for certification. There is no need to add the unfair labor practice procedures to those that any dissenting employee already has available under Section 9 of the Act to free himself of an unwanted representative. The failure of the law to treat as an unfair labor practice the conduct of either the employer or the union in executing an exclusive recognition contract, in the good faith but mistaken belief that the union had majority status, does not mean that the Board must treat the contract as a bar to an

election.[13] As Circuit Judge Fahy stated (Appendix D, *infra*, p. 22a):

> "My position does not mean that the recognition in the form given is protected should a majority of the employees at any time repudiate the union or choose another bargaining agent. On the contrary, any existing 'contract bar' policy or regulation of the Board is I think inapplicable to such a contract with a minority union, though made in such circumstances as are presented by this case."

Member Fanning, in his dissent in the instant case (R. 26-27) likewise emphasized the difference between Section 8 unfair labor practices and Section 9 procedures for selecting representatives:

> "Section 9 of the Act specifically provides methods and procedures whereby employees can select or *reject* any union asserting a claim to be, or established as, their bargaining representative. The resolution of representation cases is a matter entirely within the discretion of the Board. It is in this forum that an employer's recognition or nonrecognition of a particular union is subject to defeasance or affirmation. Where the Board is satisfied that a question concerning representation exists, the Statute does not recognize any contract as a restraint upon the right of employees to make a choice for bargaining purposes. In the instant case the employees were free at any time

[13] At an early date, the Board followed a policy that "contracts with a labor organization which did not represent a majority of the employees when made, are clearly no bar to elections." 7th N.L.R.B. Annual Report, 1942, p. 55. In *Stratbury Mfg. Co.*, 1939, 12 N.L.R.B. 618, 620-621, the Board ordered an election in a representation case, notwithstanding the existence of a contract, on a finding that the union did not have a majority on the date the contract was executed, although it later acquired a majority while the contract was in effect.

> to petition the Board for immediate decertification of the Union. The Board would then in its discretion decide whether or not the contract barred an election. A decision that the contract operated as an effective bar would, it is true, foreclose the holding of an immediate election, but this restraint upon the right of employees to quickly repudiate an unwanted representative would be imposed not by the Statute, not by the Union, *but by the Board itself.* I cannot agree that the operation of discretionary Board rules is sufficient to create an unfair labor practice where none would otherwise exist." (Italics Board Member Fanning's.)

In commenting on the decision of the Court of Appeals herein, the editors of the Bureau of National Affairs' Labor Relations Reporter (Minority Union's Execution of Contract As Unlawful Coercion Under Taft-Hartley Act, 46 BNA Analysis 17, 20, May 30, 1960) pointed up the significance of this case:

> "The adoption of the new Section 8 (b) (7) restrictions on recognition and organizational picketing left the NLRB with some effective weapons against minority-union picketing, despite the overturning of the Curtis doctrine. If the Board should succeed in maintaining the present Garment Workers rule, it will be able to place another curb on the activities of minority unions. It will be unlawful for such a union to execute a contract, even though it does nothing unlawful to obtain the contract, the contract contains no unlawful provisions, and the union believes in good faith that it represents a majority of the employees."

From any realistic view, no interference, restraint or coercion of employees nor support of a union inheres in the good faith but mistaken assumption of majority status. To manufacture some supposed injury to non-union members out of what occurred here is to give legal fiction precedence over reality.

4. Even if some technical violation of the Act occurred when the Employer granted the Union exclusive recognition when the latter did not actually have a majority at the time the strike was settled on August 30, 1957, this cannot justify setting aside the collective bargaining contract of October 10, 1957. This was an otherwise perfectly valid collective bargaining agreement executed at a time when the Union had unquestionably been designated by a majority. The majority cannot be held defective because of the exclusive recognition given the Union on August 30, 1957. But this is the only reason the Board set aside the contract. Exclusive recognition in no way serves to cause employees to join a union against their will in circumstances where, as here, it does not constitute an indication of employer preference.

The public policy in preserving stable collective bargaining relationships has been held so substantial as to outweigh any considerations which might otherwise indicate that the aid given a union by an illegal union security clause should be offset by withholding of recognition from a union until certified. See *N.L.R.B.* v. *Gaynor News Co.*, 2d. Cir., 1952, 197 F. 2d 719, 724, affirmed without consideration of this issue, 347 U.S. 17, 37, n. 35, where the court said:

> "The Board argues that the entire contract must be voided and collective bargaining relations suspended, or otherwise the union will 'be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract.' * * * we believe the remedy works out too harshly here. * * * We do not, however, think that the possible danger to employees of allowing some collective bargaining relations with this union outweighs the substantial harm to them in taking away for an indefinite period all collective bargaining rights. We have therefore decided to re-

> fuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification."

Similarly in *Puerto Rico S.S. Ass'n* v. *N.L.R.B.*, D.C. Cir., 1960, 46 L.R.R.M. 2496, 2498, the court refused to set aside an entire contract solely because of an illegal preferential hiring clause The court stated:

> "Having in mind the nature of the violation, and in the absence of any proof of conduct under the clause in question, we see no rational basis for the remedy ordered by the board. Nor do we see how it could effectuate the policies and purpose of the Act to destroy a contractual relationship which has resulted in labor peace of a number of years. There is no competing union in the picture; there are no inequities shown; and enforcement of the order would result in there being a considerable period of time while an election is being arranged and held, during which period the employees would be working without a contract and would have no bargaining representative to handle such matters as grievances. We believe that enforcement of this portion of the order would not aid in the maintenance and promotion of industrial peace and would not aid in the 'healthy policy of promoting production and employment.'"

In the instant case the Board order is so broad as to bar the employer from dealing with the Union even as the representative of its own members in such matters as grievances pending the establishment of its majority in an election (R. 16-18). If any order at all is indicated, certainly by acceptable standards the order here is much broader than can be justified. As indicated by the above court cases modifying Board orders which

upset collective bargaining contracts because of unfair labor practices not of such a character as to vitiate the whole contract, the imposition of such orders by the Board is not limited to this case and should be corrected by this Court. These orders indicate the same narrow restrictive approach to collective bargaining as is apparent in the finding that the Employer and the Union committed unfair labor practices by making an arithmetical error when they agreed to cease their former hostility and to sign a collective bargaining agreement.

All considerations of sound labor policy require that this Court review the decision below and put an end to the gross misinterpretation of the National Labor Relations Act which is adopted in that decision.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

MORRIS P. GLUSHIEN,
1710 Broadway
New York 19, New York

CHARLES J. MORRIS,
1601 National Bankers
Life Building
Dallas 1, Texas

L. N. D. WELLS, JR.,
1601 National Bankers
Life Building
Dallas 1, Texas

RUTH WEYAND,
1346 Conn. Ave., N. W.
Washington 6, D. C.

Counsel for Petitioner

July 29, 1960

APPENDIX

APPENDIX A

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*), as of 1957, at the time the unfair practices found allegedly were committed, are as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing dimunition of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of com-

merce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * * * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work

has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * *

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section (8) (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not

be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section (8) (a) of the Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made * * * ; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * * *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees

whom such employer is required to recognize under this Act;

* * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * *

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall

not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by the employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

* * * * *

"(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision

within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * *

* * * * *

"(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

APPENDIX B

Judgment of the United States Court of Appeals for the District of Columbia Circuit Filed May 19, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,038 September Term, 1959

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 15,079 September Term, 1959

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BERNHARD-ALTMANN TEXAS CORPORATION, *Respondent*.

On Petition to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Mr. Justice Burton, retired, and Wilbur K. Miller and Fahy, Circuit Judges.

Judgment

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by this court that the petition of International Ladies' Garment Workers' Union to set aside the order of the National Labor Relations Board is denied; and the order of the National Labor Relations Board will be enforced in full.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion and judgment of this court.

PER MR. JUSTICE BURTON.

Dated: May 19, 1960.

Separate dissenting opinion by Circuit Judge Fahy.

APPENDIX C

Opinion of the United States Court of Appeals for the District of Columbia Circuit

On Petition to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board

Decided May 19, 1960

Mr. Charles J. Morris, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom *Messrs. Morris P. Glushien* and *L. N. D. Wells, Jr.*, were on the brief, for petitioner in No. 15038.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, with whom *Messrs. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Herman M. Levy*, Attorney, National Labor Relations Board, were on the brief for respondent in No. 15038 and petitioner in No. 15079.

Mr. Wallace M. Cohen entered an appearance for respondent in No. 15079.

Before MR. JUSTICE BURTON, retired,* and WILBUR K. MILLER and FAHY, *Circuit Judges*.

Mr. Justice Burton: These cases present the question whether it was an unfair labor practice, under §§ 8 (a)(1) and (2) and 8 (b)(1)(A) of the National Labor Relations Act, as amended in 1947,[1] for an employer and a union

* Sitting by designation pursuant to 28 U.S.C. § 294 (a).

[1] "SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or

to enter into a collective-bargaining agreement recognizing the union as the exclusive bargaining representative of all of the employees in the proposed bargaining unit, although the union had not been authorized to act as their collective-bargaining representative by a majority of the employees. For the reasons hereafter stated, we are of the opinion that such an agreement unlawfully restrained nonparticipating employees from their free exercise of the rights of self-organization guaranteed to them by § 7 of the Act[2] and also gave unlawful support to the participating union. We therefore agree with the National Labor Relations Board's decision that such conduct in the cases before us was an unfair labor practice which the Board properly ordered discontinued.

The General Counsel for the National Labor Relations Board filed a complaint against the Bernhard-Altmann Texas Corporation, an employer, manufacturing knitwear for interstate commerce at San Antonio, Texas. The com-

---

administration of any labor organization or contribute financial or other support to it . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." 61 Stat. 140, 141, 29 U.S.C. § 159 (a)(1) and (2), and (b)(1)(A).

[2] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 61 Stat. 140, 29 U.S.C. § 157.

plaint charged the employer with entering into an exclusive recognition agreement with the International Ladies' Garment Workers' Union, AFL-CIO, at a time when the union did not represent a majority of the corporation's employees in any appropriate bargaining unit. It also charged the employer with thus contributing to the support of the union in violation of § 8 (a)(2), and with interfering with the free exercise of rights, guaranteed to the employees by § 7 of such Act, in violation of § 8(a)(1). In a separate complaint the General Counsel also charged that the union had violated § 8 (b)(1)(A) by entering into the above-mentioned agreement with the employer and thus restraining and coercing some of the latter's employees in the free exercise of rights guaranteed to them by § 7. After a hearing in which the cases were consolidated, the trial examiner issued an intermediate report recommending that each complaint be dismissed in its entirety. However, the Board, on exceptions filed by the General Counsel, disagreed with the trial examiner's conclusions. The Board found that the employer and the union had respectively engaged in the alleged unfair labor practices. It accordingly ordered each of them to cease and desist from such practices and to hold a representative election. One member concurred in part and dissented in part. 122 N.L.R.B. 1289, 1297. The union now asks this Court to set aside the Board's order, whereas the Board asks that its order be enforced. Except for filing its answer, the employer has not participated in these proceedings.

The facts found by the Board are supported by substantial evidence on the record considered as a whole and are conclusive here. 61 Stat. 148, 29 U.S.C. § 160(e). Our jurisdiction is not questioned.

Beginning in 1956, the union engaged in a campaign to organize the employer's plant. It obtained a substantial number of authorization cards signed by employees desig-

nating the union as their bargaining representative. In July 1957, a number of the employees struck in protest against a wage reduction and the union, on behalf of some of the strikers, endeavored to settle the controversy. On August 30, 1957, during these negotiations, a "memorandum of understanding" was signed by the employer and the union. In that memorandum the employer expressly recognized the union as the exclusive bargaining agent for its production and shipping employees, and the union stated that it had been designated by a majority of such production and shipping employees to act as the exclusive bargaining representative of all of such employees. There was testimony that the union maintained a running check of the number of authorization cards it held against a list of the employees believed by it to be working in the bargaining unit. When the union's Regional Director became convinced that the union had obtained cards from a majority of the workers in the unit, he so stated to the employer. The latter made no independent check of the cards and took no other steps to investigate the assertion. Likewise, there is no evidence that at the time of conconcluding the agreement the union attempted to obtain a definitive list of the employees within the proposed bargaining unit.

In October 1957, the memorandum was followed by a formal collective-bargaining agreement. This covered many subjects appropriate for such a contract and recited that a majority of the employees in the bargaining unit had designated the union as their exclusive bargaining representative. The Board found that, on the critical date of August 30, the union had not been designated as a bargaining agent, either by the votes or by the signed cards of a majority of the employees in an appropriate bargaining unit. The union disputes the Board's finding of lack of majority status on August 30. While there were questions raised as to the status of some employees, the Board was justified in the finding that the union did

not represent a majority of the employees in the designated unit on the critical date.[3]

The intent of the National Labor Relations Act, as amended, and especially of § 7, is that the decision whether or not to be represented by a bargaining representative and also the choice of that representative shall be the uncoerced decision of a majority of the employees in an appropriate unit. Obstruction of that freedom of choice, by either the employer or the union, deprives some of the employees of this guaranteed right and is an unfair labor practice under § 8. It is difficult to conceive of a clearer restraint on the employees' right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees. If upheld, that action would foreclose any other choice of a bargaining representative by a majority of the workers in the unit. It would not only impose the minority's bargaining agent upon the nonparticipating majority, it would also practically preclude the majority, during the term of the contract, from casting off the union as bargaining representative. Even if the employees might surmount the difficulties inherent in challenging the established order by presenting a petition for decertification under § 9 (c),[4]

[3] The union contends that although the August 30 memorandum may be invalid, the formal contract executed in October when the union had achieved majority status is valid. The fact that, by October, the union may have achieved a majority status during the period that it maintained an unlawful agreement is irrelevant. *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, 414, *reversing on other grounds* 105 App. D.C. 102, 107, 264 F. 2d 575, 580 (1959). See *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 703-705 (1944), and *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 372, 185 F. 2d 732, 744 (1950), cert. den., 341 U.S. 914 (1951).

[4] See *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938). "It [Congress in passing the NLRA] had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining . . . and there

it is quite likely, under the Board's decisions, that the "contract-bar" rule would prevent the majority from asserting the union's lack of majority status during the two-year term of the contract. It has been held repeatedly by the Board that in a decertification proceeding, where the contract bar has been asserted, the petitioners are not permitted to show the lack of majority status of the union at the time the contract was made.[5]

It has been repeatedly found an unfair labor practice under § 8(a)(1) and (2) for an employer to conclude a collective-bargaining agreement with a minority union.[6] In most of these cases there were aggravating factors such as the presence of a rival union or the imposition of a union security provision, but those cases do not appear to turn on the presence of these aggravating factors, nor are these factors always present. We see no material

---

were then available *data showing that once* an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of the employees, and hence in preventing the recognition of any other."

[5] See *In re Columbia River Salmon & Tuna Packers Assn.*, 91 N.L.R.B. 1424 (1950); *In re Electro Metallurgical Co.*, 72 N.L.R.B. 1396 (1947); *Sport Girl Co.*, 26 LRR Man. 1284 (1950); *In re Wilmington Terminal Warehouse Co.*, 68 N.L.R.B. 299, 302 (1946).

[6] See *e.g.*, *Dixie Bedding Mfg. Co.* v. *N.L.R.B.*, 268 F. 2d 901, 905 (C.A. 5th Cir. 1959); *District 50, United Mine Workers* v. *N.L.R.B.*, 234 F. 2d 565, 569 (C.A. 4th Cir. 1956); *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2d Cir. 1954); *N.L.R.B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, 782 (C.A. 2d Cir. 1954); *Elastic Stop Nut Corp.* v. *N.L.R.B.*, 142 F. 2d 371, 379-380 (C.A. 8th Cir. 1944), cert. den., 323 U.S. 722; *United Transports, Inc.*, CCH Lab. Law Rep. (4th ed. 1959) ¶ 56,192 (123 N.L.R.B. No. 60); *Grand Union Co.*, 122 N.L.R.B. 589; *Coast Aluminum Co.*, 120 N.L.R.B. 1326 (1958); *R. B. Wyatt Mfg. Co.*, 117 N.L.R.B. 700 (1957), aff'd *sub. nom. N.L.R.B.* v. *Steel, Metals, Alloys, Local 810*, 253 F. 2d 832 (A. 2d 1958); *International Metal Products Co.*, 104 N.L.R.B. 1076, 1077 (1953); *John B. Shriver Co.*, 103 N.L.R.B. 23 (1953); *In re Ken-Rad Tube & Lamp Corp.*, 62 N.L.R.B. 21 (1945).

distinction from the viewpoint of the employees' § 7 organizational rights between the rival union situation, where there is interference in the choice between bargaining agents, and the instant cases, where the interference affects the choice whether to bargain through a collective representative or individually.

As early as *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), it has been recognized that implicit in the duty of the employer to recognize the majority's representative of his employees as the exclusive bargaining representative is the correlative duty to deal with no agent other than that chosen by the majority.[7] Also implicit is the obligation on the part of the employer to make sure that the representative does in fact represent a majority of the employees. Conversely, it is the duty of those who seek to establish themselves as exclusive bargaining agents to make sure that they have the mandate of those in whose name they speak.

Section 8 (b)(1)(A), as enacted in 1947, prohibits unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8 (a)(1). That the provisions were intended to be parallel is indicated by the similarity of the language employed, and is confirmed by the legislative history of the provisions.[8]

---

[7] See *North Electric Mfg. Co.* v. *N.L.R.B.*, 123 F. 2d 887, 889-890 (C.A. 6th Cir. 1941), cert. den., 315 U.S. 818 (1942); *Texarkana Bus Co.* v. *N.L.R.B.*, 119 F. 2d 480, 484 (C.A. 8th Cir. 1941); *N.L.R.B.* v. *Union Pacific Stages, Inc.*, 99 F. 2d 153, 159 (C.A. 9th Cir. 1938); S. Rep. No. 573, 74th Cong., 1st Sess. 13 (1935).

[8] For expressions of intent that the two provisions establish comparable standards for employer and union conduct to those established for employer conduct by § 8 (1) see *e.g.*, the views of Senators Taft, Ball, Donnell and Jenner, S. Rep. No. 105, 80th Cong., 1st Sess. 50 (1947); statement of Senator Ball upon introducing § 8 (b)(1)(A) as an amendment, 93 Cong. Rec. 4016, and Senator Ball's further statements during debate, *id.*, at 4432-4433; Senator Taft in debate, *id.*, at 4025, 4436; remarks of Senator Smith, *id.*, at 4435.

Section 8 (a)(1), as it appeared in the original Wagner Act as § 8 (1), applied only to employer conduct. The major purpose which the sponsors of the 1947 amendments sought to achieve was to impose on unions the same restrictions as those imposed by § 8 (1) on employers respecting intrusion on protected employee activity. The omission of the word "interference" from subsection (b)(1) may not be devoid of significance when considering whether labor organizations are permitted wider latitude in peacefully persuading employees to organize than is permitted employers in opposing collective bargaining. But where union activities go beyond the level of persuasion and amount to a foreclosure of the exercise of § 7 rights by the employees, we find no basis for holding that the provisions should have a different meaning when applied to a labor organization than when applied to an employer.

This Court's decision in *Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros.)* v. *N.L.R.B.*, —— U.S. App. D.C. ——, —— F.2d ——, decided November 26, 1958, and the Supreme Court's affirmance of that decision, 362 U.S. 274, do not militate against enforcement of the Board's order in the instant cases.[9] In the *Curtis Bros.* case a minority union was engaged in peaceful picketing in an effort to secure the recognition of a union which recently had been defeated in a certification election. This Court held that such picketing was not an unfair labor practice. The instant cases involve much more direct interference and restraint of § 7 right than did the *Curtis Bros.* case. In the instant cases the recognition of the minority union is a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their

[9] Since its decision in *Curtis Bros.* the Supreme Court has assumed in *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, that the conclusion of a collective-bargaining agreement by a minority union may be an unfair labor practice. See *id.*, at 414 and dissenting opinions at 429, 433.

own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A).

The instant cases do not involve picketing and do not involve either the right of free expression or the right to strike which are protected by § 13 of the Act.[10] *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284 (1957); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The practices involved here, unlike recognitional and organizational picketing, are not specifically limited in the other unfair labor practice provisions of § 8.

An employer need not bargain with an uncertified representative if he has grounds in good faith for doubting the union's majority status,[11] but he is under a duty to bargain if he has adequate grounds for believing that the union does represent a majority.[12] It is difficult to establish ground for believing or disbelieving the existence of a majority status for a union in the face of a failure to take any steps to determine that status.[13]

---

[10] 61 Stat. 151.

[11] *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F. 2d 365, 373 (C.A. 4th Cir. 1954); *A. L. Gilbert Co.*, 110 N.L.R.B. 2067 (1954); Administrative Decisions of the General Counsel, 5 CCH Lab. Law Rep. ¶¶ 56,470, 56,537, 56,548 (1959). The rule is otherwise where a labor organization has recently been certified by the National Labor Relations Board. *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).

[12] *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 369, 185 F. 2d 732, 741 (1950), cert. den., 341 U.S. 914 (1951).

[13] Failure to investigate a union's majority claim and bargain if it is substantiated is an unfair labor practice. *N.L.R.B.* v. *Inter-City Adv. Co.*, 190 F. 2d 420 (C.A. 4th Cir. 1951), cert. den., 342 U.S. 908 (1952); *N.L.R.B.* v. *Crown Can Co.*, 138 F. 2d 263 (C.A. 8th Cir. 1943), cert. den., 321 U.S. 769 (1944); *In re Metal Textile Corp. of Delaware*, 47 N.L.R.B. 743, 753 (1943).

The central consideration here is not merely whether the employer or the union entertained a bona fide belief that the union had majority support, but whether that belief was arrived at through an adequate effort to determine the true facts of the situation.

Questions may arise as to the membership of particular employees in the bargaining unit or the validity of the union authorizations. In most of these situations clear and convincing proof of the employees' status will be readily available to the parties in the form of personnel records and other direct proof of employment status. If informal methods are not available, or they do not prove dispositive, § 9 (c) provides a formal method for an authoritative Board determination of majority representative status.

Organizational efforts will not generally turn on such thin majorities as to require a complex computation of majority status. In such a case, simple procedures are available to demonstrate majority status. It is only when the question is close that more is required. If the parties' determination of majority status is questionable, the burden is on the General Counsel to establish the alleged unfair practice and lack of majority status.

The net effect of the Board's policy is to require that labor organizations and employers refrain from recognizing by agreement a sole bargaining representative until such time as they have adequately established that such agent represents a majority of the employees in the bargaining unit. Allowing the union or the employer to do otherwise would permit them, by agreement, to undermine the employees' rights under § 7.

Accordingly, the union's petition to set aside the order is denied and the Board's order shall be enforced in full.

APPENDIX D

Dissenting Opinion of Circuit Judge Charles Fahy

FAHY, *Circuit Judge, dissenting*: The doubts which surrounded the problem presented by this case have been resolved, as it seems to me, by the necessary implications of the recent decisions of the Supreme Court in *NLRB* v. *Drivers Chauffeurs, Helpers, Local 639*, 362 U.S. 274, referred to as the *Curtis* case, and *United Rubber Workers* v. *NLRB*, 362 U.S. 329. The Court held in these cases that peaceful picketing, or a peaceful strike, by a union which did not represent a majority of the employees, to obtain immediate recognition as the exclusive bargaining agent in *Curtis*, or to obtain a contract in *United Rubber Workers*, was not an unfair labor practice under section 8(b)(1)(A) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 141-66 (1958). The subject was exhaustively considered in *Curtis*. In the absence of an objective explicitly condemned by the Act, such as appears in section 8(b)(4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8(b)(1)(A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provision, is not an unfair labor practice on the part of the union under section 8(b)(1)(A). Insofar, therefore, as the Board order rests upon recognition thus accorded I think it is not supported.

I believe it also follows that the employer on his part does not violate section 8(a)(1) or section 8(a)(2) by according such recognition or entering into such an agreement. There was no rival union competing for recognition. Moreover, the employer was not interfering with the freedom of the employees by conferring exclusive recognition in furtherance of the employer's own prefer-

ence for or desire to assist one union over another. Nor was the contract one for a union shop, see *Local Lodge No. 1424* v. *NLRB*, —— U.S. ——, (28 U.S. L. Week 4274, April 26, 1960), or claimed to be unlawful except that it accorded exclusive recognition to the union.[1] The strike was a peaceful one by the only union seeking recognition and bargaining status. The union lawfully obtained the settlement. It would frustrate the union's right so to do were it to be held that the employer, in agreeing to such a settlement, engaged on its part in an unfair labor practice which invalidated the settlement reached. Moreover, it seems to me that the contrary position requires an employer to suffer the consequences of a lawful strike without being able lawfully to bring it to an agreed end unless and until the union gains the adherence of a majority of the employees.

My position does not mean that the recognition in the form given is protected should a majority of the employees at any time repudiate the union or choose another bargaining agent. On the contrary, any existing "contract bar" policy or regulation of the Board is I think inapplicable to such a contract with a minority union, though made in such circumstances as are presented by this case.

I would set aside the order of the Board.

---

[1] The Board decision does not rest to any extent upon any other provision in the contract. I treat the case on the same basis.

E COPY.

Supreme Court, U.S.
FILED
SEP 2 19..
JAMES R. ... Clerk

No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COMEN,
Assistant General Counsel,
HERMAN M. LEVY,
Attorney,
National Labor Relations Board,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
A. The Board's finding and conclusions	3
B. The Board's order	5
C. The decision of the Court of Appeals	6
Argument	6
Conclusion	10

CITATIONS

Cases:	
Franks Bros. Co. v. *National Labor Relations Board*, 321 U.S. 702	9
Joy Silk Mills Inc. v. *National Labor Relations Board*, 185 F. 2d 732, certiorari denied, 341 U.S. 914	9
Local Lodge No. 1424 v. *National Labor Relations Board*, 362 U.S. 411	8, 9
Miami Copper Co., 92 NLRB 322	8
National Labor Relations Board v. *District 50, United Mine Workers*, 355 U.S. 453	10
National Labor Relations Board v. *Drivers Local Union No. 639* (Curtis Bros.), 362 U.S. 274	6, 7
United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62	8
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)	
Section 7	5
Section 8(a)(1)	2, 3, 5
Section 8(a)(2)	2, 3, 5
Section 8(b)(1)(A)	2, 3, 5, 7
Section 8(b)(4)	7
Section [illegible]	8

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (see Pet. 11a–20a). The Decision and Order of the National Labor Relations Board (R. 7–22)[1] are reported at 122 NLRB 1289.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1960 (Pet. 10a). The petition for a writ of certiorari was filed on August 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the Joint Appendix filed with the court below.

QUESTIONS PRESENTED

1. Whether the Board correctly held that an employer and union violated Sections 8(a) (1), (2) and 8(b)(1)(A) of the National Labor Relations Act, respectively, by recognizing the union as the exclusive representative of all employees in a specified bargaining unit at a time when the union had not been designated by a majority of the employees as the bargaining representative.

2. Whether in the circumstances set forth in Question No. 1 the Board acted within the permissible limits of its discretion (a) in ordering the employer to withdraw and withhold recognition from the union as the exclusive bargaining representative of its employees, and the union to cease acting as such representative, unless and until the union has won a Board-conducted election, and (b) in further ordering the employer and the union to cease giving effect to a collective bargaining agreement executed shortly after the illegal recognition of the union as the exclusive bargaining representative even though the union may then have attained majority status.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A to the petition (Pet. 1a).

STATEMENT

A. THE BOARD'S FINDING AND CONCLUSIONS

The Board found that the Company [2] violated Section 8(a)(1) and (2) of the Act by recognizing, and executing and maintaining a contract with, the International Ladies' Garment Workers' Union, as the exclusive bargaining representative of its employees at a time when the Union did not represent a majority of these employees. The Board also found that the Union violated Section 8(b)(1)(A) by executing and maintaining the same contract. The facts upon which these findings rest may be summarized as follows:

In October, 1956, the Union began to organize the Company's employees (R. 9, 36, 141–146). Between October, 1956 and September, 1957, the Union continued its organizational efforts, securing from employees authorization cards which designated the Union as the employees' bargaining representative (R. 36, 141–146). As of August 30, 1957, the critical date in this proceeding, the Union had not received authorization cards from a majority of the employees (R. 11–12).[3]

---

[2] Bernhard-Altmann Texas Corporation is a Delaware corporation with its principal place of business in San Antonio, Texas, where it is engaged in the manufacture of knitwear for interstate commerce (R. 35–36).

[3] The Board resolved the factual issue concerning majority status by finding that as of August 30, 1957, the Union did not represent a majority of the Company's employees. The Company payroll on that date included 357 employees, of whom 280 were within the bargaining unit (R. 129, 65, 71, 90, 100–102). In addition, the unit may have included some or all of another 120 employees laid off in the preceding month (R. 135, 61–63, 74). The Union had received authorizations from 158 employ-

On July 29, 1957, in an action unrelated to the Union's organizational campaign, certain employees struck in protest against a wage reduction in the Topping Department (R. 9, 37, 89). The Union, which represented most of the strikers, attempted to compose the differences. On August 30, 1957, following several meetings devoted to negotiation, the Union and Company signed a "memorandum of understanding" whereby the Company recognized the Union as exclusive bargaining agent for all production and shipping employees (R. 9, 37, 103–104). This contract provided among other things for an immediate termination of the strike, a wage increase, the checkoff of union dues, arbitration of disputes and the drafting of a formal agreement containing the terms of this memorandum (R. 9, 37, 103–104). Prior to the signing of the contract, the Company did not request an examination of the signed authorization cards, nor did the Union volunteer these cards (R. 9, 64, 138, 139), which would have shown that the Union did not represent a majority of the employees (J.A. 11–12; 103). Furthermore, at the time of the signing of the August 30 memorandum, the Company did not make the payroll records available, nor did it check the authorization cards against the payroll records subsequent to August 30 (R. 139).

On October 10, 1957, the Company and Union signed a formal collective bargaining agreement which

---

ees, including 88 of the laid-off employees (R. 135, 141). If those 88 are excluded, the Union represented only 70 out of a unit of 280; even if they are all included, the Union represented only 158 out of 368 or more.

incorporated the terms of the "memorandum of understanding" (R. 9–10, 105, 72). This agreement reaffirmed recognition of the Union as sole bargaining agent for the Company's nonsupervisory production and shipping workers with certain specific exclusions (R. 9–10, 106–107).[4]

On the foregoing facts, the Board concluded that the Company, by recognizing the Union as exclusive bargaining representative of the employees at a time when the Union lacked majority status, extended unlawful support to the Union in violation of Section 8(a)(2) of the Act, and interfered with, restrained and coerced the employees in the exercise of their rights under Section 7 to choose, or to refrain from choosing, a bargaining representative, in violation of Section 8(a)(1) of the Act (R. 15). The Board, one member dissenting, further concluded that the Union, by acting as exclusive bargaining representative at such a time, likewise restrained and coerced the employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act (R. 15–16, 22–27).

B. THE BOARD'S ORDER

The Board ordered the Company to cease and desist from supporting the Union and recognizing it as the exclusive bargaining representative of the employees

---

[4] The unit description conforms to the unit in the "memorandum of understanding" except for the specificity as to exclusion. Excluded in the October 10 agreement are mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truckdrivers, engineers, maintenance men, and janitors (R. 106).

in the specified unit, and to withhold recognition until the Union demonstrated its majority status pursuant to a Board-conducted election. The Union was ordered to cease and desist from acting as exclusive representative until its majority was shown by the election. The Board's order (R. 17–22) further directed the Company and the Union to cease and desist from giving effect to the "memorandum of understanding" or the contract of October 10, 1957, which had recognized the Union as the exclusive bargaining representative of the employees in the specified unit.[5] Finally, the order directed both parties to post notices.

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, speaking through Mr. Justice Burton (with Judge Fahy dissenting), affirmed the Board's findings as supported by substantial evidence on the record considered as a whole and enforced the Board's order (Pet. 11a–22a).

ARGUMENT

The decision below, for the reasons fully stated in Mr. Justice Burton's opinion (Pet. 15a–20a), is correct, does not conflict with any other court of appeals decision, and presents no issue warranting further review by this Court.

1. The crux of petitioner's case is that the decision below is inconsistent with "the principles of law" enunciated by this Court in *National Labor Relations*

[5] The Board's order, however, did not require the Company to vary or abandon any term or condition of employment established in the performance of the agreement (R. 18).

Board v. *Drivers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274. But as the court below pointed out, "In the *Curtis Bros.* case the issue was not whether the recognition of the minority union * * * was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A)" (Pet. 19a). This Court had held in *Curtis Bros.* that picketing by a minority union to achieve recognition as the employees' exclusive bargaining representative did not fall within the scope of Section 8(b)(1)(A). In reaching this conclusion, the Court had relied on the statutory protection accorded to the right to strike, including picketing, except where the statute specifically provided otherwise; the preclusion of any authority in the Board to regulate such picketing under Section 8(b)(1)(A), by implication from the specific limitations on the right to picket enacted in Section 8(b)(4); and the legislative history which negated any intent to vest in the Board authority to deal with peaceful picketing under Section 8(b)(1)(A). None of these considerations applies, however, to the execution of an agreement granting recognition to a minority union as the exclusive bargaining representative of all the employees in a specified unit, as is the situation in the present case. Indeed, it is fair to say, we think, that in *Curtis* the Court subsumed that the object of the picketing, *i.e.*, recognition of the minority union if consummated, would have been violative of the Act. See 362 U.S. at 280. Otherwise there would have been little occasion to determine the legality of the means used by the union to achieve that objective. Cf. *Local*

Lodge No. 1424 v. *National Labor Relations Board*, 362 U.S. 411, 413–414. This view of *Curtis Bros.* is borne out by the command of section 9(a) of the statute itself that only a representative designated by a majority of the employees in an appropriate bargaining unit may serve as the exclusive bargaining representative of all the employees. Thus, *Curtis Bros.* does not furnish support for petitioner's attack on the decision below.[6]

Petitioner's fears (Pet. 16–21) that the decision below will discourage collective bargaining because "[i]t prevents employees and unions from bargaining without risking either unfair labor practice charges or the delay involved in Board-conducted elections" (Pet. 21) are insubstantial. An employer remains free to recognize and bargain with a union as the exclusive representative of his employees upon satisfactory proof that a majority of the employees have designated it as their representative. "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8. However, in the present case, there was no attempt by either Company or Union to determine whether the Union did in fact have majority status. The Company neither requested an examination of the authorization cards, nor did the Union volunteer the cards. The Company made no attempt

[6] Petitioner's reliance on the Board's decision in *Miami Copper Co.*, 92 NLRB 322, is similarly misplaced. That case, like *Curtis Bros.*, dealt with the applicability of Section 8(b)(1)(A) to union strike action to compel an employer "through economic pressure * * * to invade the statutory rights of his employees * * *." 92 NLRB at 340.

to make its payroll records available, nor did it ever check the authorization cards against the payroll records. In these circumstances, to permit the parties to rely on nothing more than an alleged belief that majority status existed is to render meaningless the statutory command that exclusive recognition may only be accorded to the representative designated by a majority of the employees.

2. Equally insubstantial for purposes of certiorari is petitioner's attack upon the Board's order (Pet. 25–27). The Board properly set aside the contract of October 10, 1957, incorporating the terms of the "memorandum of understanding" of August 30, 1957, which unlawfully had extended exclusive recognition to the Union (*supra*, p. 6), because, as the court below correctly pointed out (Pet. 15a, n. 3), "The fact that, by October, the union may have achieved a majority status during the period that it maintained an unlawful agreement is irrelevant." Changes in a union's majority status attributable to unfair labor practices do not affect the Board's power to restore the *status quo ante* (cf. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 703–705; *Joy Silk Mills Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 744, certiorari denied, 341 U.S. 914), for, the "subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement" (*Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, 414).[7]

[7] It is assumed that this general statement of law is still valid when there is no question of the bar of the statute of limitations as there was in the *Local Lodge No. 1424* case.

The further provision of the Board's order directing the employer to withhold recognition from the Union as the exclusive bargaining representative of its employees, and the Union to cease acting as such representative unless and until it has "demonstrated its exclusive majority representative status pursuant to a Board-conducted election" (R. 20) fully comports with the principles enunciated by this Court in *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 463.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
HERMAN M. LEVY,
Attorney,
National Labor Relations Board.

SEPTEMBER 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 3 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents*

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

MORRIS P. GLUSHIEN
1710 Broadway
New York 19, New York
CHARLES J. MORRIS
1601 National Bankers Life Building
Dallas 1, Texas
L. N. D. WELLS, JR.
1601 National Bankers Life Building
Dallas 1, Texas
RUTH WEYAND
1346 Connecticut Ave., N.W.
Washington 6, D. C.

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
SUMMARY OF ARGUMENT	12
ARGUMENT	28
I. Good faith belief by the employer and the union that the union has been designated as their bargaining representative by a majority of the employees in an appropriate unit constitutes the proper standard for the administration of the collective bargaining obligations of the National Labor Relations Act	28
A. The statutory language, legislative history, and administrative and judicial precedents establish "good faith" as the standard for judging majority when the parties desire to bargain without first going to the Board	28
B. The "good faith" standard is the prevalent standard by which the law judges conduct in the field of business	41
C. To impose on the employer or the union the duty of making an absolutely accurate determination of majority is unreasonable and makes the self-administering features of collective bargaining unworkable	46
D. Good faith as a standard for determining majority affords adequate protection against infringement on employee rights through sweetheart agreements or favoritism among competing unions	55

Page

II. Collective bargaining between an employer and a minority union does not constitute an unfair labor practice by the employer under either Section 8 (a) (1) or (2) nor by the union under Section 8 (b) (1) (A) of the National Labor Relations Act 60

A. There is no provision in the National Labor Relations Act which reasonably construed prohibits genuine arm's length bargaining with a minority union 62

1. Section 7 of the National Labor Relations Act does not guarantee employees any rights which are infringed by genuine arm's length bargaining with a minority union 62

2. An employer by according exclusive recognition to, and bargaining at arm's length with, a minority union does not interfere with, restrain, or coerce employees within the meaning of Section 8 (a) (1) 69

3. The type of union conduct prohibited by Section 8 (b) (1) (A) does not include accepting recognition and bargaining while a minority union 72

4. An employer by according exclusive recognition to, and engaging in genuine arm's length bargaining with, a minority union does not grant it support within the meaning of Section 8 (a) (2) 74

5. The ban on union security agreements with minority unions contained in Section 8 (a) (3) indicates Congress intended to leave all other genuine agreements with minority unions valid as long as no majority union had been selected 75

6. The certification procedures of Section 9 of the Act afford full protection to the right of employees to choose a majority representative unhindered by the existence of contracts with minority unions 76

Page

B. The legislative history of the National Labor Relations Act shows that Congress intended to permit employers and minority unions to bargain collectively 79

C. During the decade following the enactment of the National Labor Relations Act bargaining with minority unions was a generally accepted and widely practiced form of collective bargaining 92

D. The decisions of this and other courts and the Board have held that bargaining with a minority union is not, without more, a violation of the National Labor Relations Act ... 96

E. To deny bargaining rights to a minority union leaves employees unable to protect themselves during the crucial period while they are organizing and trying to become a majority, makes it impossible to settle many strikes and has other undesirable consequences 103

III. The unfair labor practices, if any there were, involved in the making of the strike settlement of August 30, 1957, could not invalidate the subsequent full collective bargaining agreement of October 10, 1957 or require withholding of recognition from the union until certified 109

Conclusion 117

CITATIONS

Cases:

Addison v. Huron Stevedoring Corp., 2d Cir., 1953, 204 F. 2d 88, certiorari denied, 346 U.S. 877 46
Advance Pattern Co., 1948, 80 N.L.R.B. 29 60
Agar Packing Co., 1949, 81 NLRB 1262 67
Alco-Gravure, Division of Publications Corp., 124 NLRB 1027, enforced by consent, 6th Cir., 1959, 45 LRRM 2899 105
American Steel Foundries v. Tri-City Trades Council, 257 U. S. 184 70

Page

Apex Hosiery Co. v. Leader, 310 U.S. 469 82
Appalachian Shale Products Co., 1958, 121 NLRB 1160 76
Automotive Supply Co., Inc. 1957, 119 NLRB 1074 ... 31
Black Diamond S.S. Corp. v. N.L.R.B., 2d Cir., 1938, 94 F. 2d 875, certiorari denied, 304 U.S. 579 101
Brooks v. N.L.R.B., 348 U.S. 96 ..... 60, 68
Canal Bank v. Hudson, 111 U.S. 66 44
Central Farmer Trust Co. v. Pinkham, 1935, 119 Fla. 444, 161 So. 273, 275 44
Cleveland Worsted Mills Co., 1942, 43 NLRB 545 101
Columbia Pictures Corp., 1945, 64 NLRB 489 101
Consolidated Builders, Inc. 1952 99 NLRB 972 101
Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 ... 21, 26, 37, 67, 96, 111, 112, 113
Donds v. Local 1250, Retail Wholesale Department Store Union of America, 2d Cir., 1949, 173 F. 2d 764 ..... 67, 81, 82, 99
Eastwood-Neally Corp. v. I.A.M. 1938, 124 N.J. Eq. 274, 1 A. 2d 477 ..... 82, 99
Ekco Products Co., 1957, 117 NLRB 137 ..... 31, 40
Ferrer v. Waterman S.S. Corp., D.C. D.P.R., 1949, 84 F. Supp. 680 46
Fur Workers Union, Local 21238, App. D.C. 1939, 105 F. 2d 1, affirmed, 308 U.S. 522 82
Greenwald v. Chiarella, 1946, 271 App. Div. 213, 63 N.Y.S. 2d 49 81
H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514 55
Herff Jones Co., 1952, 97 NLRB 1070 105
The Hoover Company, 1950, 90 NLRB 1614, modified in other respects, 6th Cir., 1951, 191 F. 2d 380 .. 102
Jandel Furs, 1952, 100 NLRB 1390 104
Keystone Coat, Apron & Towel Supply Co., 1958, 121 NLRB 880 78
Kiyoichi Fujikawa v. Sunrise Soda Water Works Co., 9 Cir., 1946, 158 F. 2d 490 44
Krone v. Snapout Forms Co., 1950, 360 Mo. 821, 230 S.W. 2d 865 41
Local Lodge 1424, International Association of Machinists v. N.L.R.B., 362 U.S. 411 ..... 36, 109, 110
Local No. 259, UAW and Fanelli Ford Sales Inc., Case No. 2-CP-48, Intermediate Report, December 21, 1960, 47 LRRM 138 107

Page

Max Factor & Co., 1957, 118 NLRB 808 104
Medo Supply Corp. v. NLRB, 321 U.S. 678 68
Miami Copper Co., 1950, 92 NLRB 324 73
Midwest Piping & Supply Co., Inc., 1945, 63 NLRB 1060 ..... 55, 56
Myers Products Corporation, 1949, 84 NLRB 32 64
N.L.R.B. v. Drivers Local Union, 362 U.S. 274 .... 9, 10, 11, 23, 72, 73, 74, 97
N.L.R.B. v. Gaynor News Company, Inc., 2d Cir., 1953, 197 F. 2d 719, affirmed 347 U.S. 17 .... 104, 114
N.L.R.B. v. W. T. Grant Co., 9th Cir., 1952, 199 F. 2d 711, certiorari denied, 344 U.S. 928 32
N.L.R.B. v. James Thompson & Co., 2 Cir., 1953, 208 F. 2d 743 ..... 32, 56
N.L.R.B. v. Office Towel Supply Co., 2d Cir., 1953, 201 F. 2d 838 65
N.L.R.B. v. Superior Cable Corp., 4th Cir., 1957, 246 F. 2d 539 60
N.L.R.B. v. Rockaway News Supply Co., 345 U.S. 71 .. 113
N.L.R.B. v. Westinghouse Electric Corp., 6th Cir., 1949, 179 F. 2d 507 65
National Linen Service Corp., 1943, 48 NLRB 171 .. 67
Newark Newsdealers Supply Co., 1951, 94 NLRB 1667 . 104
Olin Industries, Inc., 1949, 86 NLRB 203, enforced 5th Cir., 1951, 191 F. 2d 613, certiorari denied, 343 U.S. 919 67
Pacific Mills Worsted Division, 1943, 11 NLRB 239 .. 102
Patton v. Roane-Anderson Co., 6th Cir., 1951, 192 F. 2d 965 46
Plumbers Union v. Dillion, 9th Cir., 1958, 255 F. 2d 820 114
Puerto Rico S.S. Ass'n v. N.L.R.B., App. D.C. 1960, 281 F. 2d 615 114
Reed v. Murphy, 5th Cir., 1956, 232 F. 2d 668, certiorari denied, 346 U.S. 831 46
F. M. Reeves & Sons, Inc., 1958, 121 NLRB 946 32
Republic Steel Corp. v. N.L.R.B., 3d Cir., 107 F. 2d 472, certiorari denied, 309 U.S. 684 67
Louis Rosenberg, Inc., 1959, 122 NLRB 450 67
H. Rothstein Co., Inc., 1958, 120 NLRB 1556 32
Schreier v. Siegel, 1942, 178 Misc. 711, 36 N.Y.S. 2d 97 45

Page

Seaboard Terminal Company, 1955, 114 NLRB 1391 .. 104
Searl v. School District Lake County, 133 U.S. 553 ... 43
Sierra Furniture Co., 1959, 123 NLRB 1..8 54
Solvay Process Co., 1938, 5 NLRB 330 101
Stratbury Mfg. Co., 1939, 12 NLRB 618 76
Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 116
Thompson Products Co., Inc., 1942, 4 W.L.R. 384 102
Top Mode Mfg. Co., 1952, 97 NLRB 1273, enforced, 3 Cir., 1953, 203 F. 2d 482 32
M. & J. Tracy, Inc., 1939, 12 NLRB 916 .....31, 40
United Butchers Abbatoir, Inc., 1959, 123 NLRB 946 .. 32
United Fruit Co., 1939, 12 NLRB 404 .....31, 40
United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 .....29, 30
United Rubber Workers v. N.L.R.B., 362 U.S. 329 11
United States v. Hutcheson, 312 U.S. 219 82
Virginian Railway Co. v. System Federation, 300 U.S. 515 97
Walls Mfg. Co., Inc., 1960, 128 NLRB 60 64
Wilson & Co., NLRB Cases Nos. 17-CA-1652, 1653, 1654, 18-CA-1167, 1168, 21-CA-4086 107
Wright v. Matteson, 59 U.S. 50 44

STATUTES:

Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. Appendix 901, *et seq.*
Section 205 (d) 45

Judiciary and Judicial Procedure, 62 Stat. 928, 28 U.S.C. 1254 (1) 2

Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185
Section 301 116

National Labor Relations Act, 61 Stat. 136, 29 U.S.C. 151, *et seq.*
Section 1 ..... 1a
Section 2 (3) 2a
Section 2 (9) 3a
Section 7 ..... 3a
Section 8 (a) (1) 3a

Page

Section 8 (a) (2) 3a
Section 8 (a) (3) 4a
Section 8 (a) (5) 5a
Section 8 (b) (1) (A) 5a
Section 8 (b) (3) 5a
Section 8 (b) (4) 5a
Section 8 (c) 6a
Section 8 (d) 6a
Section 9 (a) 7a
Section 9 (b) 8a
Section 9 (c) 9a
Section 9 (e) 10a
Section 10 ..... 10a
Section 13 ..... 11a

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101, *et seq.*
Section 13 ..... 25, 70, 82

Portal to Portal Act of 1947, 61 Stat. 88, 29 U.S.C. 258
Section 9 45

Railway Labor Act, 48 Stat. 991, 45 U.S.C. 151, *et seq.* 80

Trading with the Enemy Act; First War Powers Act, 1941, 55 Stat. 838, 50 U.S.C.A. Appendix 5 (b) (2)
Section 5 (b) (2) 44

CONGRESSIONAL MATERIAL:

78 Cong. Rec.:

3434, 1 Leg. His. N.L.R.A. 1935, p. 16 88
5384, 1 Leg. His. N.L.R.A. 1935, p. 1067 86
12453, 1 Leg. His. N.L.R.A. 1935, p. 1507 88

79 Cong. Rec.:

2332, 2 Leg. His. N.L.R.A. 1935, pp. 2430, 2431 66
2333, 2 Leg. His. N.L.R.A. 1935, p. 2432 ..30, 41, 66
2335, 2 Leg. His. N.L.R.A. 1935, p. 2438 66
2337, 2 Leg. His. N.L.R.A. 1935, p. 2441 66
7570, 2 Leg. His. N.L.R.A. 1935, p. 2335 83
7571, 2 Leg. His. N.L.R.A. 1935, p. 2336 ....88, 106
7672, 2 Leg. His. N.L.R.A. 1935, p. 2390 106
7680, 2 Leg. His. N.L.R.A. 1935, p. 2412 66

Page

93 Cong. Rec.:

3428, 1 Leg. His. L.M.R.A. 1947, p. 621 .....67, 91
3529, 1 Leg. His. L.M.R.A. 1947, p. 696 91
3834, 2 Leg. His. L.M.R.A. 1947, p. 1005 91
4131, 2 Leg. His. L.M.R.A. 1947, p. 1055 91
4194, 2 Leg. His. L.M.R.A. 1947, p. 1098 91
4361, 2 Leg. His. L.M.R.A. 1947, p. 1169 91
4446, 2 Leg. His. L.M.R.A. 1947, pp. 1225-1226 91
4580, 2 Leg. His. L.M.R.A. 1947, p. 1244 91
4675, 2 Leg. His. L.M.R.A. 1947, p. 1300 91
7536-7537, 2 Leg. His. L.M.R.A. 1947, p. 1653 .67, 91

Hearings before the Senate Committee on Education and Labor on S. 2926, 73rd Cong., 2d Sess.

p. 51, 1 Leg. His. N.L.R.A. 1935, p. 81 .....66, 85
p. 63, 1 Leg. His. N.L.R.A. 1935, p. 93 84
p. 116, 1 Leg. His. N.L.R.A. 1935, p. 146 ..... 65, 66
pp. 938-939, 1 Leg. His. N.L.R.A. 1935, pp. 976-977 66

Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess.

p. 43, 1 Leg. His. N.L.R.A. 1935, p. 1419 ....89, 106
p. 46, 1 Leg. His. N.L.R.A. 1935, p. 1422 66
p. 57, 1 Leg. His. N.L.R.A. 1935, p. 1433 80
p. 58, 1 Leg. His. N.L.R.A. 1935, p. 1434 ....86, 106
p. 81, 1 Leg. His. N.L.R.A. 1935, p. 1457 89
p. 127, 1 Leg. His. N.L.R.A. 1935, p. 1507 88
p. 180, 1 Leg. His. N.L.R.A. 1935, p. 1560 89
p. 608, 2 Leg. His. N.L.R.A. 1935, p. 1994 90
p. 635, 2 Leg. His. N.L.R.A. 1935, p. 2021 89
p. 875, 2 Leg. His. N.L.R.A. 1935, p. 2261 106

Hearings before the House Committee on Labor on H R. 6288, 74th Cong., 1st Sess.

p. 16, 2 Leg. His. N.L.R.A. 1935, p. 2490 ....89, 106
p. 18, 2 Leg. His. N.L.R.A. 1935, p. 2492 66
p. 63, 2 Leg. His. N.L.R.A. 1935, p. 2537 84
p. 200, 2 Leg. His. N.L.R.A. 1935, p. 2674 66
p. 278, 2 Leg. His. N.L.R.A. 1935, p. 2752 106

Page

H. Rep. No. 969 on H.R. 7978, 74th Cong., 1st Sess.

p. 18, 2 Leg. His. N.L.R.A. 1935, p. 2928 105
p. 19, 2 Leg. His. N.L.R.A. 1935, p. 2929 105

H. Rep. No. 1147, on S. 1958, 74th Cong., 1st Sess.

pp. 9-10, 2 Leg. His. N.L.R.A. 1935, pp. 3056-3057 70
p. 17, 2 Leg. His. N.L.R.A. 1935, p. 2310 58
p. 20, 2 Leg. His. N.L.R.A. 1935, pp. 3069-3070 .. 87

H. Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess., pp. 18-19, 1 Leg. His. L.M.R.A. 1947, pp. 309-310 .. 71

H.R. 2493, 73d Cong., 2d Sess., 1 Leg. His. N.L.R.A. 1935, pp. 1130, 1131, 1139 .....82, 83

S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess.

p. 9, 2 Leg. His. N.L.R.A. 1935, p. 2309 57
p. 10, 2 Leg. His. N.L.R.A. 1935, pp. 2309-2310 .. 57
p. 11, 2 Leg. His. N.L.R.A. 1935, p. 2310 58
p. 13, 2 Leg. His. N.L.R.A. 1935, p. 2313 87

S. Rep. No. 730 on S. 1958, 74th Cong., 1st Sess.

p. 13, 2 Leg. His. N.L.R.A. 1935, p. 2313 106

S. 2926, 73rd Cong., 2d Sess., 1 Leg. His. N.L.R.A. pp. 3-4 82

MISCELLANEOUS:

Annotation: Unfair Labor Practices; Discrimination Between Union Members and Non-Members as to Wage Increases, 41 A.L.R. 654 104
Bargaining in the Steel Industry, 3 L.R.R.M. 853 93
Brooks, Robert R. R., As Steel Goes, Yale Uni. Press, 1940 93
Brooks, Robert R. R., When Labor Organizes, Yale Uni. Press, 1937 92
B.L.S. Bull. No. 1267, Director of National and International Labor Unions in the United States, 1959.. 35
Chrysler-Auto Workers Contract, 2 L.R.R. Man. 964 .. 92
35 C.J.S. 605 42
Feldesman, William, Contract Bar to Representation Elections, 29 Geo. Wash. L. Rev. 450, Dec. 1960 .. 78

Page

General Motors-Auto Workers Contract, 2 L.R.R.M. 959 92
Harbison, Frederick H., Collective Bargaining in the Steel Industry, 1937 93
Harbison, Frederick H., Patterns of Union-Management Relations, 1947 93
Harris, Herbert, American Labor Act (1939) 92
Holmes, Oliver Wendel J., The Common Law, Little Brown and Co., 1938 Ed. 42, 43
Labor Relations of United States Steel Corporation, 2 L.R.R. Man. 1009 92
National Labor Relations Board
7th Annual Report, 1942 76
17th Annual Report, 1952 102
National War Labor Board Bulletin on Procedure, approved October 4, 1918 81
Refusal to Issue Complaint by General Counsel, Case No. SR-522, June 30, 1960, 46 L.R.R.M. 1225 64
Restraint and Coercion: Execution of a Collective Bargaining Contract by a Minority Union, 1959, Duke Law. Journ. 624 37
Significance of Union Recognition, 2 L.R.R. Man. 936 95
Smith, Russel A., The Evolution of the Duty to Bargain Concept in American Law, 39 Mich. Law Rev. 1065, May, 1941 81
Taylor, Myron C., Ten Years of Steel, Labor Relations of United States Steel Corporation, 2 L.R.R. Man. 1009 92
Union Recognition as Shown in Contracts, 1-A L.R.R. Man. 781 94
U. S. Dept. of Labor Information Bulletin, Vol. 5, No. 6, William L. Munger, Bargaining in the Automobile Industry (1938), 2 L.R.R. Man. 1952 ....93, 108
Webb, Sidney and Beatrice, Industrial Democracy, 1920 ed. 80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents*

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

OPINIONS BELOW

The opinion of the court below (R. 129-138) and the dissenting opinion of Circuit Judge Charles Fahy (R. 138-139) are reported at 280 F. 2d 616. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 1-12) and the dissenting opinion of Board Member John H. Fanning (R. 13-16) are reported at 122 N.L.R.B. 1289.

JURISDICTION

The judgment of the Court of Appeals (R. 140-141) was entered on May 19, 1960. The petition for a writ of certiorari was filed on August 1, 1960 and was granted on October 10, 1960 (364 U.S. 811). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether settlement of a strike by exclusive recognition of a union in the good faith but mistaken belief that the union had been designated by a majority of the employees in an appropriate unit, is an unfair labor practice by the employer under Section 8 (a) (1) and (2) and by the union under Section 8 (b) (1) (A) of the National Labor Relations Act.

2. Even if Question 1 is answered in the affirmative, whether the collective bargaining agreement entered into subsequent to the settling of the strike and at a time the union had unquestionably been designated by a majority of the employees in an appropriate unit, can properly be held by the Board to be unenforceable by the union and the Board can properly order the employer to withdraw and withhold recognition from the union and the union to cease acting as a collective bargaining representative of any of the employees until it has won a Board conducted election, all solely because of the union's failure to have been designated by a majority when the strike was settled.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 1a-11a.

STATEMENT

Bernhard-Altmann Texas Corporation, hereinafter called the Employer, is a Delaware corporation, which is engaged in the manufacture of knit wear at San Antonio, Texas (R. 21). In the fall of 1956 its employees began signing authorization cards in the International Ladies' Garment Workers' Union, AFL-CIO, hereinafter called the Union (R. 2, 21-22; 58-60, 123-128).[1] In varying numbers employees from October, 1956, to September, 1957, signed cards designating the Union as their representative for purposes of collective bargaining (R. 22; 123-128). No other labor organization was involved in organizing or seeking to represent these employees (R. 22). At all times prior to August 30, 1957, "the Employer vigorously opposed the Union's efforts," and its employees were aware of this opposition (R. 22; 90).

On July 29, 1957, a substantial number of employees went on strike against the Employer because of a wage reduction in the Topping Department (R. 2, 22; 82). Many of the strikers had signed union authorization cards, although some card signers did not participate in the strike, and during the progress of the strike other employees, both strikers and non-strikers, continued to join the Union (R. 42-43, 58-60, 117-118, 123-128).

During the last week of August 1957, conferences between representatives of the Employer and the Union, to settle the strike, were held in New York City where the home offices of both the Employer and the Union are located (R. 2, 22; 83-85). The Employer

[1] References preceding the semicolon are to the Board's findings, including the findings of the Trial Examiner which were adopted by the Board; succeeding references are to the supporting evidence.

representative did not have any copies of the payroll in New York City (R. 54-55, 121). However, on at least two occasions Employer representatives advised the Union "of the number of people whom (sic) they determined would be working for them or eligible to join the union" (R. 86). At the hearing many months later, it was established that the Employer's payroll for the week ending August 31, 1957 showed 286 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors" (R. 4, 26; 39-41, 46-47, 112-116). Seven of these 286 were probationary employees on that date (R. 82-83). Some 25 others had been hired during the strike, and Employer representatives in New York City assured the Union these were solely temporary (R. 26; 88-90). At this time there was also an undetermined number of employees in layoff status, with the maximum in this group 120, although to the extent that these persons had secured other permanent employment they would not be considered still employees of the company (R. 26; 43-44, 117-118).

The Union representatives had with them in New York City the cards signed by employees authorizing the Union to represent them (R. 84). These cards were turned over to the Union's attorney, Morris Glushien, who was then engaged in conferences with Leo Guzik, the Employer's attorney (R. 84-85). By August 30, 1957 the Union had received 186 cards, all of which were admittedly genuine and valid (R. 58-61, 123-128), although it later turned out that 28 of these cards were signed by employees who were not current employees in the bargaining unit on August 30, 1957 (R. 58-61, 128).

On or about August 30, 1957, in the course of settlement conferences the Union determined that it represented a majority of the employees, on the basis of a comparison of the number of cards in its possession and the number of employees who the Employer stated were "eligible to join the union" (R. 86). The Union then stated to the Employer that it had authorization cards signed by a majority of the employees and requested recognition and bargaining rights (R. 86). The Employer agreed to recognize the Union and settle the strike. Both the Union, in making the claim of majority on August 30, and the Employer in accepting the claim, acted upon the honest and reasonable belief that this claim was true, as the Trial Examiner and Board later found (R. 5, 27; 86).

The Employer and the Union executed a short informal written "memorandum of understanding" on August 30, 1957, reciting that the strike was terminated, that the Employer "recognizes the Union as the exclusive bargaining agent for all production and shipping employees," that all striking employes shall return to work without discrimination, that certain improved wages and conditions of employment were granted and that "formal agreement containing these terms" will "be promptly drafted by the attorneys and signed by both parties within the next two weeks" (R. 2-3, 21-22; 94-95). There was no mention of any requirement of union membership or any form of union security.

On October 10, 1957, the Employer and the Union executed a formal collective bargaining contract, embodying the terms reached in the strike settlement (R. 3, 23; 60-61, 96-111). This contract did not contain any form of union security clause. In this contract

the parties for the first time delineated precisely the bargaining unit for which the Employer recognized the Union (R. 86-88). The contract in this regard provides (R. 97):

> "The bargaining unit covered by this agreement consists solely of all non-supervisory production and shipping department workers employed by said Employer, excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors."

On October 10, 1957, the date upon which the formal collective bargaining contract was executed (R. 60-61), the Union had been designated as their collective bargaining representative by a majority of the employees in the unit described in the contract (R. 23-24).[2]

Thereafter charges were filed and a complaint issued alleging that the Employer had committed unfair labor practices in violation of Section 8(a)(1), (2) and (3)

---

[2] The Board made no finding as to how many were in the appropriate unit on either August 30 or October 10. The largest possible number of employees in the agreed upon unit on October 10 could not have exceeded 383, although it was undoubtedly even smaller because of the uncertainty of the various lists which the General Counsel introduced. Assume the maximum from these lists as follows: 287 from G.C. Ex. 4 (R. 39-43, 46-48, 61-62, 112-116), 120 from G.C. 5 (R. 42-44, 61-62, 117-118), and 12 from the stipulation (R. 60-61). From this, 36 must be subtracted to account for those who it was stipulated had terminated (R. 91-92). A further deduction should be made to eliminate the 25 temporary employees hired during the strike (R. 26; 88-90) although some of these are probably duplicated in the list of 36 terminations. Even without such further reduction the unit would contain 383, of which the Union had a clear majority of 211 (R. 58-60, 123-128).

of the National Labor Relations Act and that the Union had committed unfair labor practices in violation of Section 8 (b) (1) (A) and (2) of that Act (R. 20). After the usual proceedings the Trial Examiner issued his Intermediate Report dismissing the complaint in its entirety (R. 20-30). The Trial Examiner pointed out that the General Counsel had neither alleged nor defined the appropriate unit on August 30, 1957 (R. 25) and that "the record provides no reasonable basis for other than a number of speculative possibilities, both as to what an appropriate unit was on August 30, 1957, and as to precisely how many employees were properly to be counted within any or all of these possible units" (R. 28). The Trial Examiner also found that "all" of the evidence "leads to the reasonable conclusion that both parties were acting in good faith on August 30: the Union in claiming majority, and the Employer in accepting the claim" (R. 27) and that "the Employer and the Union entered into the August 30 memorandum of understanding in good faith" (R. 27).

Upon exceptions filed by the General Counsel, the Board held that it was not necessary to determine what the appropriate unit was on August 30, 1957 nor how many employees were in the unit on that date (R. 4-5), because judged by the standards of the unit which the parties agreed upon in their October 10, 1957 contract, however employees in that unit were counted on August 30, 1957, and however union membership cards were counted, the Union did not have a majority in that unit on August 30, 1957 (R. 4-5). The Board determined that, solely because of such assumed lack of majority, the Employer by entering into the strike settlement with the Union on August 30, 1957 interfered with, restrained and coerced its employees in

violation of Section 8 (a) (1) and contributed support to the Union in violation of Section 8 (a) (2) of the Act (R. 5) and the Union restrained and coerced employees in violation of Section 8 (b) (1) (A) of the Act (R. 6).[3] The Board ruled that the good faith of the Employer and the Union was immaterial (R. 3, 5).

As a remedy for these unfair labor practices the Board entered an order directing the Employer and the Union to cease and desist from the unfair labor practices found (R. 8-12). The Employer was also ordered to cease giving effect to the "memorandum of understanding" dated August 30, 1957 and to the collective bargaining agreement executed October 10, 1957, to cease and desist from recognizing the Union "as the representative of any of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment" and to withdraw and withhold recognition from the Union as the exclusive bargaining representative of its employees until the Union shall have won a Board-conducted election (R. 9-10). With respect to the Union, while the Board, in stating what remedy it regarded as necessary, announced it would order the Union to cease and desist from acting as the "collective bargaining representative of any of the Company's employees unless and until" it won a Board election (R. 9), the order by its terms was narrower in that the

[3] There were no other acts of unfair labor practices found. All allegations of individual acts of coercion had been dismissed by the Trial Examiner (R. 30) and no exceptions to this dismissal were filed by the General Counsel or by any other party. The Board expressly recited that the Employer and the Union did not violate the Act except by "recognizing" the Union and "executing a contract with it, at a time when said Union did not enjoy majority status" (R. 8).

Union was ordered to cease and desist from acting as the "exclusive bargaining representative" until it shall have won a Board-conducted election and to cease giving effect to the "memorandum of understanding" of August 30, 1957 and the collective bargaining agreement executed October 10, 1957 (R. 11). The Board however stated in its decision that nothing therein should be construed as requiring the Employer to vary any wage, hour, seniority, or other substantive feature of its relations with its employees which the Employer has established in performance of its contracts with the Union (R. 8-9), or "prejudice the assertion by employees of any rights they may have thereunder" (R. 9-10).

Board Member John H. Fanning dissented from the finding of the majority of the Board "that the Union's acceptance of recognition by the Employer in a contract establishing higher wages and better working conditions for the employees constitutes restraint or coercion of these employees within the meaning of Section 8 (b) (1) (A)" (R. 13-14). Relying upon his earlier expressed disagreement with the majority of the Board in the case of *Curtis Brothers, Inc.*, 119 N.L.R.B. 232, which dissenting views were adopted by this Court in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, Board Member Fanning stated that if picketing or a strike for recognition by a minority union did not violate Section 8 (b) (1) (A) of the Act, neither could an "employer's *voluntary recognition* of a minority union impose upon that union an unfair labor practice solely on the ground that it *accepted* recognition" (R. 14-15). (Italics Board Member Fanning's.) Board Member Fanning concluded (R. 15):

> "Here was a union that fought hard to secure substantial benefits from a reluctant employer *in a*

> *contract that did not require any employee to be or become a member of the Union.* * * * It seems to me the majority tilts at windmills in holding that the bona fide attempt of a minority union to secure substantial benefits for employees through collective bargaining amounts to unlawful restraint or coercion. I see no wrong doing here and would not fashion an unfair labor practice out of mere error in statistics." (Italics Board Member Fanning's.)

Upon petition by the Union filed in the court below to review and set aside the Board's order, the court below by a two to one decision, with Circuit Judge Charles Fahy dissenting, directed enforcement (R. 129-139). The majority of the court below distinguished this Court's decision in the *Curtis* case (*N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274) stating (R. 136):

> "In the instant cases the recognition of the minority union is a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of Section 8 (b) (1) (A).
>
> "The instant cases do not involve picketing and do not involve either the right of free expression or the right to strike which are protected by § 13 of the Act. * * * The practices involved here, unlike recognitional and organizational picketing, are not specifically limited in the other unfair labor practice provisions of § 8.

The majority of the court held that the action of the Employer in entering into a collective bargaining

agreement with a minority union "would foreclose any other choice of bargaining representative by a majority of the workers in the unit" (R. 133). In reaching this conclusion, that further choice was foreclosed, the majority of the court apparently relied on the current practice of the National Labor Relations Board, known as the contract-bar rule, which treats existing valid collective bargaining agreements as a bar to an election. The court stated (R. 133-134):

> "* * * it is quite likely, under the Board's decisions, that the 'contract-bar' rule would prevent the majority from asserting the union's lack of majority status during the two year term of the contract."

The majority of the court viewed this "foreclosure of the exercise of § 7 rights by the employees" (R. 136) as restraint and coercion by the union in violation of Section 8(b)(1)(A). The majority of the court approved the Board's policy, stating (R. 138) that its

> "net effect * * * is to require that labor organizations and employers refrain from recognizing by agreement a sole bargaining representative until such time as they have adequately established that such agent represents a majority of the employees in the bargaining unit."

Circuit Judge Charles Fahy deemed that the decisions of the Court in the *Curtis* case and in *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 329, were dispositive of the case and required that the Board's order be set aside in its entirety. Referring to the *Curtis* case, Circuit Judge Fahy stated (R. 138-139):

> "In the absence of an objective explicitly condemned by the Act, such as appears in section

> 8 (b) (4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8 (b) (1) (A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provisions, is not an unfair labor practice on the part of the union under section 8 (b) (1) (A). * * *
>
> "I believe it also follows that the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement."

The court below on May 19, 1960, entered a judgment enforcing the Board's order in full (R. 140-141).

SUMMARY OF ARGUMENT

I. The good faith belief of an employer and a union that the union has been designated by a majority of the employees in an appropriate unit as their bargaining representative constitutes the proper standard for administration of the collective bargaining obligations of the National Labor Relations Act. The Trial Examiner in the instant case found that both the Employer and the Union in good faith believed the Union had been designated by a majority of the employees on August 30, 1957 when the strike settlement memorandum was signed. The Board held that the good faith of the parties was immaterial and since the majority had not in fact designated the Union, recognition of the Union constituted an unfair labor practice by both the Employer and the Union. In so holding the Board departed from proper standards for administering the statute.

A. The National Labor Relations Act affords a system of self-administration of the rights and duties set forth in the statute without the necessity of governmental intervention. Whenever a majority of the employees in an appropriate unit selects a bargaining representative it is the duty of the employer under Section 8 (a) (5) and of the union under Section 8 (b) (3) to bargain collectively without either the employer or the union first coming to the Board for certification of the union. The statute leaves the parties free to agree on any appropriate unit. The statute likewise leaves the employees free to designate a union by any method, including membership cards, acclamation or ballot.

In this context the Board and the courts over the years have uniformly, except for the instant case, accepted the good faith belief of the employer and the union that the union was the choice of a majority of the employees in an appropriate unit, as an adequate basis upon which exclusive recognition might be granted and valid collective bargaining agreements negotiated. Indeed, the Board and the courts have regularly held it to be an unfair labor practice for an employer to seek proof of majority before according recognition and bargaining when the employer had no good faith doubt of majority. Conversely, if either had a good faith doubt, the refusal to bargain did not constitute an unfair labor practice.

Under the foregoing standard, which was in full force and effect on August 30, 1957, the Employer and the Union would each have been guilty of an unfair labor practice if instead of dealing on the basis of exclusive recognition and settling the strike it had insisted on proof of majority. From that moment on the strike would have been an unfair labor practice strike.

Aside from the fact that the Board is here holding the Employer and the Union to a course of conduct diametrically the opposite of the conduct required by all the numerous Board and Court precedents extant at the time, the new standard applied by the Board and the majority of the court below in the instant case is not consonant with the purposes and policies of the statute. If employers and unions cannot rely in good faith on their determinations of majority, but must proceed at their peril, under a requirement that majority must be "adequately established", they will most surely refuse to bargain collectively without prior Board certification.

Resort by all employers and unions to the Board for certification as a prerequisite to collective bargaining would flood the Board with more cases than it could possibly handle. The delays incident to going to the government for repeated certifications, where no good faith doubt of majority existed, would not only cause a great waste of taxpayers' money but so impede and delay collective bargaining as to make it unworkable. Especially when strikes are threatened or in progress, to require absolutely accurate majority determinations will unnecessarily prolong strikes if it does not make them impossible to settle.

The good faith judgment of an employer and a union made at the time bargaining takes place as to whether the majority of employees desire to be represented, is generally far superior to any determination the Board can make on the basis of a cold record many months later. Certainly, in a strike situation such as prevailed in the instant case, where the employer has always vigorously opposed organizing by the union,

the concession of the employer that a majority of his employees now desire representation by the union is a judgment entitled to great respect. This is especially true when the Board itself is unable to determine which employees should be counted as in the unit on the date of recognition. The Board cannot many months later run an election which will reflect union sentiment at an earlier date. The good faith assessment made on the scene by the parties aware of all the facts is probably in the long run a more valid appraisal of employee sentiment than any the Board can make on the basis of testimony and records.

B. The good faith standard is the prevailing standard by which the law assesses responsibility for conduct in the field of business. It is widely accepted as the governing standard of conduct in property law, negotiable instruments law, corporate law, the law of fiduciary relations and a host of other fields. It is also the principle upon which as a practical matter the business of the world is daily transacted.

Good faith is a general term with an elastic meaning and serves as a symbolic expression denoting the exercise of reasonable care, prudence and diligence. It assumes blameworthiness as the basis for default. Although primitive communities may have tended to protect property by requiring those who impinged to act at their peril, such a concept is inconsistent with the requirements of modern business. The rapid transaction of a great variety of dealings with all sorts of people, involving legal consequences, must be allowed to proceed on the basis of what the actor knows at the moment he acts. Where he has a reasonable belief that he knows enough to act, a requirement that he must make an additional investigation

in order to have an accuracy he judges unnecessary, would slow up business to the point where it could not function.

This Court and Congress have expressly recognized good faith as the appropriate standard in a variety of business transactions governed by federal law.

C. If the law were to impose on the employer or the union the duty of making an absolutely accurate determination of majority as a prerequisite to dealings between them, collective bargaining would prove unduly cumbersome. The determination of majority involves more than taking two known sets of names and seeing if one set contains more or less than twice the number of the other. In order to make an absolutely accurate resolution of the majority issue, determinations of both issues of law and of fact must be made as to which persons are properly within an appropriate unit and which persons have selected the union. The inability of the Board in the instant case ever to decide either how many persons were in the unit or how many had designated the union on August 30 shows how unreasonable it is to require the parties to make such a determination with absolute accuracy before bargaining collectively. Especially is this true when it is remembered that the Board's efforts at determining majority in the instant case were made with its large staff of trained personnel and many months of time in which to collect all available records and witnesses. With the results of all the Board's efforts before him, the Trial Examiner, who saw the witnesses and knew which records were used to prepare the various lists introduced into evidence, held that the Board had failed to prove that the Union did not have a majority.

In strike situations, such as prevailed in the instant case on August 30, 1957, the task of determining with absolute accuracy a majority is often well nigh impossible. The payroll of the employer is woefully useless in determining how many of those on strike are to be included in the unit or how many of the strike-breakers are to be regarded as temporary employees and excluded. In addition there are usually complicated issues of law and fact which must be investigated and resolved to determine the status of persons not currently on the payroll—whether on leave of absence, quit, discharge or lay-off—distinctions which are generally not clearly defined in non-union companies, but which suddenly must be defined in determining whether a majority exists. There is also the question of borderline types of employees such as working foremen and semi-professional employees—should they be within or without the unit?

It is completely unreasonable to ask an employer and a union to delay negotiations to settle a strike while they spend time making the factual investigations and securing the legal opinions necessary to resolve such issues. And even where no strike is in progress, the threat of a strike looms over almost all collective bargaining negotiations for a new contract. Delays may produce a strike. To impose on the parties petty legal details at this crucial point must necessarily lead to bad employment relationships. Rather their good faith determination that the union is the choice of a majority of the employees must be accepted as sufficient, if collective bargaining is to work.

To penalize a union by taking away its contract and representation rights where the employer so represents his payroll as to lead the union to believe in good

faith that it has a majority, encourages employer trickery. To escape a strike situation, he can easily mislead the union into making an advantageous contract, and then place the union in the position where it finds itself deprived of the contract when the employer comes up with another version of his payroll. Moreover, to obtain knowledge of who is active in the union, the employer can insist that to be absolutely certain of the authenticity of union membership cards, he must personally examine them. The good faith standard removes the incentive to employers to engage in such trickery.

If collective bargaining cannot proceed on the same good faith basis as generally governs business dealings, collective bargaining loses its stature as a usual ingredient of modern business. Encumbering its exercise with out worn legalisms discourages the practice and procedure of collective bargaining.

D. Good faith as a standard for determining majority contains as an inherent ingredient a ban on sweetheart agreements or employer selection of representatives for his employees. Unless an employer and a union have made an honest and reasonable determination of majority based on the evidence readily at hand, the employer or the union has not exercised good faith. Such infringements on employee rights as occur when employees and unions engage in collusive arrangements to impose a union on employees against their will or to throw the employer's favor to one of two competing unions will necessarily be excluded, because good faith cannot possibly exist in such situations. The good faith standard leaves the Board full power in each case to judge the employer's and the union's conduct on the bases of

their honesty and reasonableness in determining majority under all the circumstances of the situation in which they acted.

The recognition of a union as the exclusive bargaining representative where both the employer and the union have a reasonable good faith belief that the union is the majority representative does not in fact constitute interference, restraint or coercion of employees or support to a union. The subjective element of employer favoritism, with its coercive effect on employees, is absent when the employer confers recognition in the good faith belief in the union's majority. Neither does the recognition constitute support to a union, either from the point of view of the employer or the employees. Since recognition is nothing more than is due in the situation reasonably assessed, it cannot be support. The grant of only what is legally due is not prohibited support. Section 8 (a) (2) which prohibits support by an employer of a union was adopted by Congress as a means of prohibiting employer domination of company unions. Its legislative purpose has no relationship to the instant type of situation.

That there is no interference, restraint, coercion or support in the situation where employer and union bargain in a good faith but mistaken belief in majority is apparent when it is remembered that the courts hold no such consequences flow from requiring an employer and a certified union to continue bargaining for at least a year after certification although the union has admittedly lost its majority.

II. Collective bargaining between an employer and a minority union does not constitute an unfair labor practice by the employer under either Section 8 (a)

(1) or (2) nor by the union under Section 8 (b) (1) (A). In this connection we distinguish between collective bargaining and exclusive recognition. In situations where both the employer and the union know that the union has only a minority status there is nothing wrong in their engaging in genuine arm's length bargaining and executing contracts in which the union is recognized as the representative of its members only and wages, hours, and terms of employment fixed for all employees. We do not contend, however, that an employer or a union fully aware of the union's minority status can enter into a binding provision in a term contract in which the employer obligates himself contractually to recognize the union as the exclusive representative of all employees in the unit covered by the contract, for the term of the contract. While we do not believe either the employer or the union commits an unfair labor practice by so contracting and while we do not believe the entire contract is invalidated by such a provision, we do admit this sort of a recognition clause would not be legally binding if before the term of the contract expired, a union was selected by a majority and sought exclusive recognition.

A. There is nothing in the Act making bargaining between an employer and a minority union an unfair labor practice.

1. Section 7 of the Act does not guarantee employees any rights which are infringed by genuine arm's length bargaining with a minority union.

The first right which the Board assumed was guaranteed by Section 7 and which it found violated here, the Board described as "the right to bargain independently and individually with their employer in the

absence of a majority representative" (R. 6). But no language appears in Section 7 conferring such a right. The numerous cases holding that an employer may freely discharge any employee for attempting to bargain individually establish beyond peradventure of doubt that Section 7 does not guarantee any right to individual bargaining. If there were any ambiguity in the language, the legislative history of the Act overwhelmingly supports this hitherto unquestioned interpretation. The sponsors of both the original Wagner Act and the Taft-Hartley Amendments regarded the usual industrial worker as completely helpless to bargain individually with his employer. They also took the view that even where some exceptional worker can bargain, one uniform standard of pay, hours and conditions is the usual, as well as the essential, practice in modern industrial establishments and any individual bargaining disrupts this practice; a modern management therefore could not reasonably be expected to try to bargain with individual workers.

The second right which the Board assumed was guaranteed by Section 7 and which it found was violated here, the Board described as "the right to be represented only by a majority representative" (R. 6). This is inconsistent with the well established interpretation of the Act as protecting employees to be represented by minority unions so long as the majority have not agreed upon one union. It is uniformly held that an employer commits an unfair labor practice by discharging or otherwise interfering with, restraining or coercing employees because they are attempting to be represented by or bargain through a minority union. Indeed, this Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236-237, upheld the right of employees to bargain collectively through

a union which had not established itself as freely chosen by a majority. The legislative history of the Act supports this interpretation. Likewise, the repeated holdings of this and other courts that a union which has lost its majority must be recognized by the employer as the exclusive bargaining representative of his employees in a variety of situations show there is no absolute right not to be represented by a minority union.

The majority of the court below found that the right freely to choose representatives guaranteed by Section 7 was violated because the court assumed that a contract with a minority union would foreclose the employees for the period of the contract from choosing a majority representative (R. 133-134). But there is nothing in the contract here made by the Union and the Employer which restricts any employee in this right. The contract contained no union security clause. The Board is free to run an election at any time and certify another union.

2. An employer by bargaining at arm's length with a minority union does not interfere with, restrain or coerce employees within the meaning of Section 8 (a). (1). There is nothing inherently of a nature which infringes on any employee's freedom to join or not join, to be represented or not be represented, in the mere fact that an employer and a minority union negotiate and sign a collective bargaining agreement, so long as the contract contains no union security provisions. All employees, union as well as non-union, remain as free after the signing of the contract as they were before to exercise their rights to bargain collectively.

Wages set by an employer where there is no majority designation of a union may be determined by the employer in any manner he pleases. He may consult employer associations, personnel advisers or astrologists to determine wages, hours or other conditions. Such unilateral dictation of terms is legal. How then can it be contended that negotiating with a minority union is unlawful? It is necessarily more in keeping with the policies of the Act to have a minority of the employees participate in fixing their employment terms than to have none of them do so.

3. A union which has not yet achieved a majority does not restrain or coerce employees in the exercise of rights guaranteed by Section 7 by bargaining with an employer. The type of union conduct prohibited by Section 8 (b) (1) (A) of the Act, making restraint or coercion by a union an unfair labor practice, does not encompass peaceful measures taken by a union to secure recognition and collective bargaining. This Court's holding in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, that Section 8 (b) (1) (A) does not bar strikes or picketing for recognition and collective bargaining by a minority union must necessarily mean that this section does not bar peaceful acceptance of recognition and the exercise of representation rights by a minority union.

4. Arm's length bargaining with a minority union does not constitute support within the meaning of Section 8 (a) (2). Genuine bargaining with a minority union is the antithesis of support. It connotes that the employer is not giving the union anything that the union by the exercise of its potential or actual economic strength has not been able to wrest from the employer. In the instant case, where the settlement

agreement terminated a month long strike, certainly the word support cannot be stretched to cover the gains which the union wrested from the employer by the use of the employees' economic strength.

5. By imposing one limitation on bargaining with minority unions, namely the proviso to Section 8 (a) (3) banning union security agreements with a union not chosen by the majority, the statute by implication permits all other bargaining with minority unions.

6. The certification procedures of Section 9 of the Act afford full protection to the right of employees to choose a majority representative unhindered by the existence of contracts with minority unions. The statutory scheme thus provides a means of preserving full freedom of choice without any necessity for construing the unfair labor practice provisions of the statute as banning bargaining with minority unions.

B. The legislative history of the National Labor Relations Act establishes that Congress intended to permit employers and minority unions to bargain collectively subject only to the one restriction that they could not enter into a union security contract. Collective bargaining as practiced in England where it originated and as practiced in the United States prior to the Railway Labor Act Amendments of 1934 and the original National Labor Relations Act of 1935 had proceeded without any requirement that the unions have a majority adherence among the employees as a prerequisite to collective bargaining. Neither in actual practice nor for legal purposes was any inquiry made as to the extent of adherence. It was accepted as common law doctrine that employees could bargain through minority unions.

Congress was fully cognizant that unions often had to make contracts covering shops where they had few members in order to protect their contracts with unionized employers from the competition of non-union shops. The Norris-LaGuardia Act had been tailored by Congress with a view to preventing the use of injunctions to bar picketing for recognition and contracts by unions at establishments where they did not have a majority.

The original Wagner-Connery Bills as introduced in Congress in February 1934 made only one mention of majority, namely that a closed-shop contract was invalid unless made with a majority union. In this connection Senator Wagner pointed out that under existing law contracts with minority unions were valid including those containing a closed shop. The bills provided that it was an unfair labor practice to refuse to recognize or deal with representatives or to fail to exert every reasonable effort to make and maintain agreements and empowered the Board to certify representatives, without specifying any standard for determining representatives. Congressman Connery, as chairman of the House Labor Committee holding hearings on this bill, stated his view that where there was no majority union but several minority unions the Board would designate the largest as the representative.

Various witnesses suggested amending the bill so that collective bargaining would be mandatory after a majority had chosen a union, with an accompanying direction to the Board to certify majority unions. By this they desired to exclude all individual and minority union bargaining once a majority had been selected, while at the same time leaving minority

unions free to bargain collectively until a majority choice evolved.

C. During the decade following the enactment of the National Labor Relations Act collective bargaining with minority unions was widely practiced and unquestionably accepted as legal under the National Labor Relations Act. The major contracts in the auto and steel industries in 1937 and 1938 were executed on the basis of recognition for members only although the contracts by their terms applied to all employees in the units covered. The use of the form of recognition for members only evidenced the failure of the union to establish its majority status. Collective bargaining contracts with unions which had not secured majority status were prevalent in wide segments of American industry. Text writers and administrative agencies repeatedly recited the validity of such bargaining under the National Labor Relations Act.

D. The decisions of this and other courts and the Board have held that bargaining with a minority union is not a violation of the National Labor Relations Act. Indeed, except for the instant case we know of no case in which either the courts or the Board have ever held bargaining with a minority union to be an unfair labor practice if there was no majority union, no union security clause, no rival union and no employer collusion. This Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 232-236, refused to allow the Board to set aside, because of coercive acts of the employer in favor of the contracting union, collective bargaining contracts with a union which concededly had not established its majority status This Court there held that such contracts made with a minority union were valid and served the purposes of the statute

to promote collective bargaining. Other courts have repeatedly recognized the validity of such collective bargaining contracts.

E. To deny bargaining rights to minority unions leaves employees unable to protect themselves during the crucial period while they are organizing and trying to become a majority and makes it impossible to settle strikes where there is no majority union. It also has other undesirable consequences.

III. The unfair labor practices, if any there were, involved in making the strike settlement of August 30, 1957, could not invalidate the subsequent full collective bargaining agreement of October 10, 1957, which was made at a time when admittedly a majority of the employees in the appropriate unit covered by the agreement had designated the Union as their representative. There was nothing in the fact of the execution of the August 30, 1957, strike settlement nor in the terms of that settlement which prevented the employees from freely joining or refraining from joining the Union. Hence authorization cards signed subsequent to August 30, 1957, are entitled to full validity and establish a substantial majority on October 10, 1957.

Furthermore, there is no valid reason for the Board's order barring the Employer from dealing with the Union as the representative of its own members, whether on grievances or otherwise, pending its establishment of its majority in an election.

ARGUMENT

I.

GOOD FAITH BELIEF BY THE EMPLOYER AND THE UNION THAT THE UNION HAS BEEN DESIGNATED AS THEIR BARGAINING REPRESENTATIVE BY A MAJORITY OF THE EMPLOYEES IN AN APPROPRIATE UNIT CONSTITUTES THE PROPER STANDARD FOR THE ADMINISTRATION OF THE COLLECTIVE BARGAINING OBLIGATIONS OF THE NATIONAL LABOR RELATIONS ACT

The good faith belief of both the Employer and the Union at the time they negotiated and executed the first agreement between them (namely the strike settlement of August 30, 1957) that the Union had been designated as the collective bargaining representative by a majority of the employees was expressly found by the Trial Examiner (R. 27) and by the Board (R. 3, 5). The Board held that the good faith of the Employer and the Union was immaterial (R. 3, 5). Rather the Board held that although everyone believed on the basis of reasonable evidence that the Union was the proper exclusive representative, in fact it was not, and hence recognition of, and executing a contract with, the Union was illegal (R. 3-7). In holding that good faith belief that the Union was the majority choice was not a defense, the Board departed from the proper standards for administration of the collective bargaining provisions of the statute.

A. The statutory language, legislative history and administrative and judicial precedents establish "good faith" as the standard for judging majority when the parties desire to bargain without first going to the Board.

The statutory scheme of the National Labor Relations Act, in keeping with the findings and policies set out in Section 1 of the Act, affords a system of self administration by employers and unions of the rights and duties set forth in the statute without the

necessity of resorting to governmental agencies. Section 1 sets forth the Congressional finding that inequality of bargaining power between unorganized employees and corporate employers leads to business depressions, by depressing wage rates and purchasing power of wage earners, whereas collective bargaining by organized employees remedies these conditions. Hence it is established as Congressional policy to encourage collective bargaining. To this end Section 8 (a) (5), coupled with Section 9 (a), imposes on employers and Section 8 (b) (3) imposes on unions the duty to bargain collectively whenever a majority of the employees in an appropriate unit choose a representative. This Court in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 74-75, held that these sections imposed a duty on an employer to bargain with a union which had concededly been designated by a majority without either the employer or the union first coming to the Board for certification or any other purpose.

Careful examination of the various mentions of unit in the statute shows Congressional intent to leave the employer and the union free to agree on any appropriate unit.[4] The Act similarly retains complete flexi-

[4] Section 9 (a) uses the expression "Representatives designated or selected • • • in a unit appropriate." Section 8 (a) (3) (i) excepting union security agreements from the ban on discrimination refers to "the appropriate collective bargaining unit covered by such agreement." Section 9 (e) (1) providing for elections to revoke the authority of a union to enter into a union security contract provides for such elections upon petition "by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization." As the Board noted (R. 4, n. 4), in the absence of any violation of law or policy, the Board customarily finds stipulated or agreed upon units appropriate.

bility with respect to the manner in which employees shall designate or select a b[illegible]ining agent. Section 9 (a) provides that the "Representatives designated or selected for purposes of collective bargaining by the majority" shall be the exclusive representative. The legislative history of this section establishes that Congress wished to leave employees free to choose representatives in any manner they desired. See, for instance, the following excerpt from a speech by Bishop Francis J. Haas, a member of the National Labor Board, which was inserted in the Congressional debates preceding enactment of the original National Labor Relations Act. The speech, dealing with Section 7 (a) of the National Industrial Recovery Act, which guaranteed the right of employees to self-organization and collective bargaining, in pertinent part stated:[5]

> "The first essential feature about Section 7 (a) is that it places no restriction on workers in choosing their representatives. It does not require them to choose their bargaining agents from a limited group, for example, fellow workers on the payroll. * * * Likewise, it leaves them entirely free to use any method they want—membership cards, acclamation, or ballot—in selecting their representatives. In a word, it is a worker's selection, and the employer has nothing to say about the representatives to be selected or the method of selecting them."

This Court in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 74, in construing the collective bargaining obligations of the National Labor Relations Act, similarly stated:

---

[5] 79 Cong. Rec. 2333, 2 Leg. His. N.L.R.A. 1935, p. 2432.

> "Section 7 recognizes the right of the instant employees to 'bargain collectively through representatives of their own choosing' and leaves open the manner of choosing such representatives when certification does not apply."

The National Labor Relations Board for more than two decades following the enactment of the National Labor Relations Act, followed the foregoing flexible standard. Employee designation or selection of unions by refraining from coming to work during a strike[6] or by acquiescence and support by a majority of the employees of the union's "direction and control of the strike and settlement coupled with the wearing of * * * [union] buttons",[7] was deemed binding on both the employer and the Board.

In this context the Board evolved the standard of good faith belief that a majority had selected the union as the standard applicable where there was no certification. The Board and the courts applied the good faith standard to such an extent that it has regularly been held that an employer violated his duty to bargain collectively with a union if the employer sought to secure from the union proof of its majority where the employer had no good faith doubt of the union's majority. The rule regularly followed by the Board and the courts was stated in *Automotive Supply Co., Inc.*, 1957, 119 N.L.R.B. 1074, 1094-1095, as follows:

> "Respondent contended that the Union had a duty to prove its majority to the Company. This

---

[6] *Ekco Products Co.*, 1957, 117 N.L.R.B. 137, 144-145; *United Fruit Co.*, 1939, 12 N.L.R.B. 404.

[7] *United Fruit Co.*, 1939, 12 N.L.R.B. 404, 410; *M. & J. Tracy, Inc.*, 1939, 12 N.L.R.B. 916, 929.

would be true only if the Company had any good faith doubt which here it did not have. *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, enfd. as modified 185 F. 2d [sic] (C.A. D.C.), cert. denied 341 U.S. 914. *Artcraft Hosiery Company*, 78 N.L.R.B. 333; *Merchandiser Press, Inc.*, 115 N.L.R.B. 1441, 1449; *N.L.R.B.* v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821 (C.A. 9), enfg. 111 N.L.R.B. 93."

In addition to the authorities cited in the foregoing quotation, see to the same effect: *F. M. Reeves & Sons, Inc.*, 1958, 121 N.L.R.B. 1280; *United Butchers Abattoir, Inc.*, 1959, 123 N.L.R.B. 946, 957; *H. Rothstein Co., Inc.*, 1958, 120 N.L.R.B. 1556; *Top Mode Mfg. Co.*, 1952, 97 N.L.R.B. 1273, enforced, 3d Cir., 1953, 203 F. 2d 482; *N.L.R.B.* v. *W. T. Grant Co.*, 9th Cir., 1952, 199 F. 2d 711, certiorari denied, 344 U.S. 928.

The converse was likewise true. If an employer or a union had a good faith doubt of majority, it was not guilty of an unfair labor practice in refusing to bargain even if the union in fact had been designated by a majority. In *N.L.R.B.* v. *James Thompson & Co.*, 2 Cir., 1953, 208 F. 2d 743, 745, in an opinion by Circuit Judge Learned Hand, the court reversed the Board for failing to accept the Trial Examiner's finding that the employer had a good faith doubt of majority and hence had not violated Section 8 (a) (5) by refusing to bargain. The Trial Examiner's finding of good faith was held binding on the Board.

The Board's holding in the instant case that the Employer and the Union, even though they had no good faith doubt of majority, should have insisted on strict definition of all inclusions in and exclusions from the unit, on strict proof of the number of employees in the unit and on strict proof of the number

of designation cards signed by employees in the unit, is materially inconsistent with the foregoing uniform rule followed by the Board and the courts at all times prior to August 30, 1957 when the alleged unfair labor practices were committed by the Employer and the Union in the instant case.

The Board is now insisting that the Employer and the Union should have committed acts which under then prevailing decisions would have constituted the unfair labor practice of refusing to bargain by insisting first on strict proof of facts as to which they had no good faith doubt. If the Employer or the Union had insisted on strict proof of majority on August 30, 1957, when neither of them doubted that the Union represented a majority, they would have been unable to negotiate and hence the month old strike then in progress would have continued. Under the Board doctrine that an employer or a union who has no good faith doubt of majority commits an unfair labor practice by refusing to bargain, the strike would from that date on have been an unfair labor practice strike and might have resulted in heavy back pay awards.

Aside from the fact that the Employer and the Union are now being held to a standard diametrically opposite to the standard prescribed by Board and court decisions at the time the conduct here involved took place, we submit that the former standard was the correct one under the statute and that the new standard applied by the Board in the instant case is so out of keeping with the purposes and policies of the Act as to constitute an improper standard.

The policy of encouraging collective bargaining will be frustrated on a wide scale if an employer and

a union, neither of whom has any doubt as to the union's majority status, act at their peril in bargaining collectively. Unless good faith is the standard, all employers and all unions will have to go to the Board both for unit determinations and for majority determinations, for there is no reason to apply good faith to the unit determination but absolute accuracy as to the majority determination. Indeed the two are so inextricably interwoven as to defy separation, because one must know the unit before one can determine the majority. For instance in the case at bar, the Union could not have known whether it had a majority unless it had learned from the employer the number in the unit. This determination could not be made until the Employer and the Union agreed on the exact scope of the unit—not only whether it should cover production and shipping employees as opposed to merely production employees or also maintenance employees,[8] and whether a variety of borderline supervisory, mechanical, designing, sample making, truck driving, time study, clerical, cafeteria and engineering employees should be in or out,[9] but also whether it

[8] In most industries production and maintenance employees constitute the core of the appropriate unit whereas in the garment industry the Board has found the unit here agreed upon (R. 94, 97) to be appropriate (R. 4, 28, and cases there cited).

[9] There were 13 categories excluded in the agreement reached October 10, 1957 (R. 97) although even at that time the Employer and the Union were still in disagreement as to whether certain specific employees did or did not fall within the unit (R. 47-48, 52-53, 86-88). At the time the Employer and the Union signed the strike settlement on August 30, 1957, they did not try to work out the exact exclusions and inclusions, other than to agree that the basic unit would be production and shipping employees (R. 86-87, 94) and that strike breakers would be discharged and strikers would be rehired (R. 88-90).

included employees who were probational, temporary, part time, laid off, striking or strike breaking (R. 26; 43-44, 82-83, 88-90, 117-118).

The number of employers and unions which are today engaged in collective bargaining are so greatly in excess of the number that the administrative agencies can process for unit and majority determination as to make the statute completely unworkable should good faith standards be displaced by a standard requiring the employer and union to determine the correct unit and correct majority or suffer the consequences of illegality. There are more than 150,000 collective bargaining contracts currently in effect in the United States, according to the most recent estimates of the Bureau of Labor Statistics.[10] It is safe to state that only a small fraction[11] of these are with certified unions. Furthermore these 150,000 contracts cover only one fourth of the labor force.[12] Should the policy of Congress to encourage collective bargaining be realized with respect to these three fourths as yet not subject to collective bargaining agreements, the frus-

---

[10] B.L.S. Bull. No. 1267, Directory of National and International Labor Unions in the United States, 1959 (G.P.O. December 1959), p. 15.

[11] The Statistical Analysis Branch of the National Labor Relations Board keeps cumulative statistics on the number of unions which have won Board conducted elections and has supplied us with the information that from the inception of the Board in 1935 through June 30, 1959, there were 72,336 Board conducted elections won by unions. Neither the Board nor the Department of Labor has any figures as to how many of these elections were won by the same union year after year nor how many unions in all are today certified nor how many contracts are with certified unions. The vast bulk of these 72,336 elections were conducted many years ago and the certifications issued therein are now obsolete.

[12] B.L.S. Bull. No. 1267, op. cit., pp. 1, 15, 16, 21-22.

trations from waiting for government determination of unit and majority would become even greater, and also a great deal of the taxpayers' money would be wasted.

If the *bona fide* determinations of union majority and unit can be upset by the Board when employers and unions have made a mistake in the complicated process of determining unit and inclusions and exclusions therefrom, employers and uncertified unions will in the future be hesitant to enter into collective bargaining agreements without prior Board determination of unit and majority. Increased instability in labor relations must necessarily result if the more than a hundred thousand employers and unions who are today parties to contracts where there is no certification should suddenly become aware that renewing agreements without certification of the union subjects them to such consequences as the rule applied in the instant case entails. The decision below forces them to be certain not only of the union majority at the time of renewal but also that there was a union majority when the prior contract was signed, unless the events incident thereto have been barred by the statute of limitations. Cf. *Machinists Local* v. *N.L.R.B.*, 362 U.S. 411, 425-426. And if the three times as many employers and potential unions who will need to bargain should the policy of encouraging collective bargaining come into complete fruition, similarly realize the perils they face without Board certification, labor relations will be further unstabilized

Especially in strike situations, the decision below, if not set aside, will make it difficult if not impossible to settle many strikes. The parties may not wish to resort to the election process and even if they wish to, the delays which attend petitions for Board conduct

of elections would greatly lengthen strikes should the parties be placed at their peril in signing a settlement agreement without Board certification.

Even where no strike was in progress, this Court recognized that the policy of encouraging prompt signing of contracts in order to avoid strikes is so strong that the delay incident to waiting for a Board-conducted election should not be permitted in the absence of compelling reasons. In *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U.S. 197, 237, in setting aside a Board order which invalidated contracts made with an uncertified union in which the wages, hours and terms of employment of all employees were fixed and in holding that they should be permitted to continue in effect as contracts recognizing the union as the representative of its members only, this Court said:

> "* * * the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. * * * The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of the employees, would remove that salutary protection during the intervening period."

The effect of the rule enunciated below to discourage collective bargaining has been described and discussed in a note on the Board's decision in this case entitled: Restraint and Coercion: Execution of a Collective Bargaining Contract by a Minority Union, 1959, Duke Law Jour. 624, 628-629:

> "This decision also involves federal labor policy considerations which indicate that a different rule might be more desirable. It seems fair to

say that the decision could have the effect of discouraging bargaining contracts because it requires that a union act therein at its peril, good faith being expressly excluded as a defense. A union may be faced with serious difficulty in ascertaining the exact number of employees in a bargaining unit. This certainly would be true in highly seasonal and cyclical industries in which large scale lay offs are common.[20] Hence, at any given moment the exact number of employees may be in doubt or may be reasonably, but mistakenly, ascertained. Furthermore, should the employer be negligent in supplying the union with the correct number of employees in a bargaining unit from the payroll records, the union, under the rule in the instant decision, must share the risk of commiting an unfair labor practice.

"All of these considerations may discourage[21] unions from signing collective bargaining contracts because none of these circumstances would be considered a legitimate defense and because the necessity for making a determination of majority status would cause delay at the most critical

---

"[20] Technically, laid-off workers are still employees, but some of them may have obtained permanent equivalent employment elsewhere, in which case they would no longer be so regarded. *American Cyanamid Co.*, 19 N.L.R.B. 1026 (1940)."

"[21] The deterrent effect of the decision is two-fold. In *Bernard-Altmann* [sic], the Board's order directed the union to cease acting as bargaining representative until it had demonstrated its majority status in a Board-conducted election. This is a prerequisite not otherwise mandatory which the union might well desire to avoid because of the delay involved, and because of the ever present possibility of losing the election, which would foreclose additional elections for at least one year. Furthermore, a finding of unfair labor practice by the union would create a psychological atmosphere unfavorable to furtherance of the union's organizational activities."

point in negotiations just prior to signing. Even though the Taft-Hartley Act has retreated from the Wagner Act position of vigorously encouraging the formation of collective bargaining contracts, there is still a very strong national policy favoring industrial stability which is enhanced by the signing of such contracts.[22] Discouragement of collective bargaining contracts is obviously not consonant with national labor policy. It would be unfortunate if *Bernard-Altmann* [sic] should have that undesirable effect." (footnote 22 omitted)

Nor is it at all certain that Board attempts in subsequent unfair labor practice proceedings to determine whether at a prior date a majority of the employees in an appropriate unit desired the union as their representative result in more accurate determinations of majority than the good faith determination of the employer and the union made at the time. For instance, the Board in the case at bar has never been able to determine what was the appropriate unit or how many employees were in fact in it on August 30, 1957. As a strike was then in progress, with the employer attempting to operate the plant with strike breakers (R. 88-90), the problem of determining which employees were in the unit was complicated by the problem of deciding whether strikers or strikebreakers or both were to be regarded as in the unit. Section 9 (c) (3) of the National Labor Relations Act precludes the Board when conducting an election from permitting strikers who are not entitled to reinstatement from voting. Here in negotiating the settlement of the strike, the Employer assured the Union that the strikebreakers were merely temporary employees and would be displaced to permit reinstatement of the strikers (R. 88-90). The Board was unable to determine which groups of employees should have been

counted in the unit (R. 4-6). The record fails to establish any such uncertainty in the minds of the Employer and the Union when they made their calculation of majority preceding their August 30 settlement of the strike.

In addition to the fact that the Employer and the Union at the time they were settling the strike probably had a much clearer idea of which employees were eligible to be counted as in the unit than the Board months later after the actual facts of reshuffling the plant and recalling strikers had taken place, and disclosed a set of events which neither party could reasonably have foretold at the time they counted majority, the Employer and the Union likewise had a much better sense of whether a majority of the employees wanted the Union to bargain for them than the Board could obtain by a mere counting of membership cards months later. Only an election at the time can disclose the true sentiment of workers. But in the absence of an election, the Employer and the Union's good faith assessment of majority sentiment at the time is undoubtedly far superior to the Board's subsequent efforts at determining majority wishes at an earlier date. The Board has no way of determining how the employees would have voted if an election had been conducted on August 30, 1957. The Board has often recognized that other methods of determining majority designation or selection than the mere count of authorization cards is valid.[13] As we have hitherto pointed out Congress did not provide for the signing of authorization cards as the method of designating or

---

[13] *Ekco Products Co.*, 1957, 117 N.L.R.B. 137, 144-145; *United Fruit Co.*, 1939, 12 N.L.R.B. 404.

selecting a union. A union could be selected by any method, even one as informal as "acclamation."[14]

In the strike situation prevailing from July 29, 1957 to August 30, 1957, it was easy for both the Employer and the Union to know where the majority choice lay. An employer who has fought a union (R. 90) does not concede that a majority of his employees have selected a union when in fact they have not. By all rational tests, the good faith judgment made on the scene at the time by the employer and the union is far superior to a subsequent Board judgment made on a cold record. To refuse to give effect to the good faith judgment of the Employer and the Union, and impose penalties based on the much less accurate subsequent assessment of the Board, is unsound legalism. Rather the good faith judgment of the Employer and the Union should be accepted.

B. The "good faith" standard is the prevalent standard by which the law judges conduct in the field of business.

The use of good faith as the standard for conduct is prevalent in the business community and in large segments of the law governing the business community. In *Krone* v. *Snapout Forms Co.*, 1950, 360 Mo. 821, 230 S.W. 2d 865, 869, the court expressed and applied this principle. The court said:

> "It was written that faith is 'the evidence of things not seen.' But 'good faith' is more than a state of mind. Under those circumstances it may also be a concrete principle upon which the world's business is daily transacted."

The court held that where defendants were sued for libel on the basis of a letter in which they had accused

[14] 79 Cong. Rec. 2333, 2 Leg. His. N.L.R.A., 1935, p. 2432.

the plaintiffs of having "committed this breach of good faith" by certain business transactions, the issue of whether there was in fact a breach of good faith was a question for the jury and its verdict should not be set aside by the courts.

The wide acceptance of the standard of good faith in property law, negotiable instruments law, corporate law, the law of fiduciary relations and a host of other fields is apparent from examining the variety of uses of the term set forth in 35 C.J.S. Faith, p. 605. There the term is described as follows:

> "*Good faith.* These two words, or their Latin equivalent, appear frequently in the law, constituting a general term with a somewhat elastic meaning, and described as a symbolic expression denoting the exercise of reasonable care, prudence, and diligence."

The classic statement of blameworthiness as the basis of modern legal default appears in Holmes, The Common Law. There he emphasizes that whatever tendency there was in the primitive community to protect property by requiring those who impinged to act at their peril, such a concept "is hardly consistent with the requirements of modern business."[15] He points out that the law recognizes that "the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."[16] "All foresight of the future, all choice with regard to

---

[15] Oliver Wendell Holmes, J., The Common Law (Little Brown and Co., 1938, ed.), p. 100.

[16] *Id.*, p. 95.

any possible consequences of action depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known." [17] "The distinctions of the law are founded on experience, not on logic. It therefore does not make the dealings of men dependent on mathematical accuracy." [18]

Good faith is the present legal description for the standard deemed necessary to keep the wheels of the modern business world moving and at the same time hold the actors therein to a standard of reasonable regard for the facts and the law. It recognizes that to hold men to an absolute accuracy as to law or facts would slow up modern business to the point where it could not function.

Even in the field of real property, there is a tendency to recognizing "that the policy of protecting titles must yield to the policy of protecting trade." [19] For instance as early as 1890 this Court in *Searl* v. *School District No. 2 in Lake County*, 133 U.S. 553, 561, held that in eminent domain proceedings the value of improvements made in good faith on real estate should not go to the true owner of the land who under strict property law became the owner of each brick as it was set to construct the building on its land, but rather should go to the good faith improver. This Court there said (at 561):

> "The right of recovery, where the occupant in good faith believes himself to be the owner, is

[17] *Id.*, p. 95.

[18] *Id.*, p. 312.

[19] *Id.*, p. 100.

declared to stand upon a principle of natural justice and equity, * * *."

Similarly see *Canal Bank* v. *Hudson,* 111 U.S. 66, 79-81, construing the term good faith in a statute allowing a purchaser of land in good faith to recover the value of improvements, and *Wright* v. *Matteson,* 59 U.S. 50, 56, construing a statute to permit acquisition of title by adverse possession enjoyed under color of title acquired in good faith. An executor appointed under an invalid will is entitled to compensation out of the estate for her services and expenses if she acted in good faith. *Central Farmer Trust Co.* v. *Pinkham,* 1935, 119 Fla. 444, 161 So. 273, 275.

Congress in regulating business has often specified good faith as the standard to be observed. Sometimes the courts, in construing legislation, find an implied intent on the part of Congress to adopt good faith as the standard. Other times Congress expressly provides that good faith shall be the governing standard. For instance Section 5 (b) of the Trading with the Enemy Act, as amended by Section 301 of the First War Powers Act, 1941, 55 Stat. 838, 50 U.S.C.A. Appendix Section 5 (b) (2) provided:

> "* * * no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

For a construction of the word good faith in this section see *Kiyoichi Fujikawa* v. *Sunrise Soda Water Works Co.,* 9 Cir., 1946, 158 F. 2d 490, 494.

The Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. Appendix Sections 901 *et seq.*, Section 205 (d) provided:

> "No person shall be held liable for damages or penalties in any Federal, State or Territorial Court, on any grounds for or in respect to anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation agreement thereunder or under any price schedule * * *"

See *Schreier* v. *Siegel*, 1942, 178 Misc. 711, 36 N.Y.S. 2d 97, 101, holding that good faith compliance with regulations issued under this statute was a complete defense to a suit for unfair competition based on conduct regulated by the statute.

The Portal-to-Portal Act of 1947, 61 Stat. 88, 29 U.S.C. 258, Section 9, provides:

> "In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged."

For cases denying employees minimum wages or overtime because the employer acted in good faith within the meaning of the above quoted section see

Addison v. *Huron Stevedoring Corp.*, 2nd Cir., 1953, 204 F. 2d 88, 92-93, certiorari denied, 346 U.S. 877; *Reed* v. *Murphy*, 5th Cir., 1956, 232 F. 2d 668, 676-677, certiorari denied, 352 U.S. 831; *Patton* v. *Roane-Anderson Co.*, 6th Cir., 1951, 192 F. 2d 965; *Ferrer* v. *Waterman S.S. Corp.*, D.C. D.P.R., 1949, 84 F. Supp. 680, 694.

We have not made any exhaustive study of the extent to which Congress has specified good faith as the standard for compliance with its legislative enactments. The foregoing instances do illustrate that there is a wide field in which Congress has adopted good faith as the standard for compliance.

C. To impose on the employer or the union the duty of making an absolutely accurate determination of majority is unreasonable and makes the self-administering features of collective bargaining unworkable.

If the determination of majority required merely the checking of authorization cards against payroll, as the Board's decision in the instant case seems to assume (R. 5), it might not be unreasonable to impose the duty of absolute accuracy as a prerequisite to valid exclusive recognition contracts, assuming that the parties could secure some absolutely neutral person to check the cards without risk of the employer learning the names of union members and further assuming that the Board may properly require employees to designate unions by signing authorization cards, although numerous Board decisions have accepted less formal indications of union selection as equally valid.[20] But the Board's own failure in the instant case to determine how many employees were in the appropriate unit on August 30, 1957, and how many of the em-

[20] See cases cited n. 13, p. 40, *supra*.

ployees in the unit had signed authorization cards prior to that date (R. 4), indicates that the problem is not simply one of counting two sets of names and determining if one set is twice as large as the other. Indeed, the fact that the Board, with its large staff of trained personnel and with many months of time in which to collect all the available records and witnesses, has never yet been able to figure out how many employees were in the unit August 30, 1957 or how many union authorization cards had been signed by this date by employees properly in the unit, shows how completely unreasonable and unworkable it is to impose on employers and unions the duty of making an absolutely accurate determination of these matters as a prerequisite to entering into a valid collective bargaining agreement.

The bland assumption that a payroll and authorization cards are all the employer and the union need to determine majority is completely unfounded. In the instant case with an actual total payroll of 357 employees on August 30, 1957 and 186 union authorization cards, an analysis of the problems of determining majority which appear from the record shows that in excess of a hundred additional items of evidence are necessary, evidence of the type an employer and a union could not even begin to collect and digest as a preliminary to settling a strike. These additional necessary items of evidence relate to four types of issues: (1) how many of those who went on strike are still to be counted as employees eligible to vote if the Board were conducting an election; (2) how many of those hired as strikebreakers are only temporary employees who should not be eligible to vote as both they and the Employer regard them as temporary make weights;

(3) how many different types of jobs represented by persons on the payroll are to be excluded from the unit because they are supervisory, professional or of a character sufficiently unrelated to production work as to treat them as outside the unit; (4) how many persons not presently on the payroll are still employees—whether because they are on leave of absence, sick leave, maternity leave, discharge, quit or lay-off status. These are distinctions which are often treated as without significance in non-union companies and hence records of these matters may not be precise or accurate, but they are matters suddenly of great importance when a union demands recognition. An accurate resolution of each of these types of issues requires extensive data.

With respect to the issue of how many strikers were still employees, the payroll of July 29, 1957 would have been needed to find out that there were 120 employees who had been working on July 29, 1957, who were not on the payroll for August 30, 1957 (R. 4). Undoubtedly both the Employer and the Union regarded a large number of these 120 as strikers who would be reinstated upon the settlement of the strike. But additional evidence as to each individual would be necessary to know he had been off the payroll of August 30 because he was on strike or because of lay-off or other reason. Half of the Union's membership was in this group—88 out of the 186 authorization cards represented employees working on July 29, 1957 but not on August 30, 1957 (R. 4-5). Under the definition of employee set out in Section 2 (3) of the Act, whether or not each of these 120 was an employee on August 30, 1957 depends on whether he ceased work in connection with a labor dispute and whether he had se-

cured other "regular and substantially equivalent employment." Section 2 (3) insofar as relevant to this issue provides:

> "The term 'employee' shall include any * * * individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * * and who has not obtained other regular and substantially equivalent employment, * * *"

The kind of an investigation which the Employer and the Union would have been required to make to determine if these 120 employees each left work as a striker and had continued his status as a striker without getting other regular and substantially equivalent employment, is not the kind that businessmen ordinarily make in the conduct of their day to day business affairs. Rather we believe the business standard would be to assume that the 88 of the 120 who had signed Union membership cards were strikers and that none of them had gotten other regular and substantially equivalent employment.

In addition to determining that 88 of these 120 were still employees, a further determination as to each is necessary since only such of them as could expect reinstatement would be eligible to vote in a Board conducted election. Section 9 (c) (3) of the Act as it read prior to the 1959 amendments and insofar as here relevant provides:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

Assuming that the rules applicable to Board conducted elections may be binding on the parties in determining majority, a matter which is far from clear, the

parties would have to determine to what extent the positions of strikers had been filled with permanent employees. This again would not be evident from the payroll. Here the Employer during the discussions with the Union preceding determination of majority told the Union that it intended to reinstate all the strikers, and that the persons newly hired since the strike began were temporary and would be displaced (R. 26; 88-90). Presumably such temporary strike-breakers would not be eligible to be included in the election and hence would not be properly included in determining the number of employees in the appropriate unit on August 30, 1957. Again who these were could not be determined solely by reference to the payroll of August 30, 1957, but would require resort to extrinsic evidence.

In respect to the number of employees in the unit, it was also necessary for the parties to agree upon inclusions and exclusions. On August 30, 1957, when the Employer and the Union settled the strike they had not worked out with any explicitness exactly what categories of employees were to be included or excluded. They had agreed merely on the basic central group of employees in the unit, namely production and shipping employees (R. 86-88, 94). In the subsequent formal contract of October 10, 1957, thirteen specific categories of employees were listed as excluded from the unit (R. 97). It is too much to ask an Employer and a Union to delay settling a strike until a study can be made of all fringe groups and agreement reached on which to include and which to exclude. Here the bargaining unit as finally agreed upon was described in the contract as follows:

> "The bargaining unit covered by this agreement consists solely of all non-supervisory pro-

duction and shipping department workers employed by said Employer, excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors."

The record in this case does not show how many employees within the unit as defined in October 10, 1957, were on the payroll covering August 30, 1957. The General Counsel for the Board introduced an exhibit showing that the payroll for the week ending August 31, 1957, contained 286 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors" (R. 4, 26; 39-41, 46-47, 112-116). The General Counsel made no effort to prove how many of the persons working on August 30, 1957 fell in eleven excluded categories. The Employer's plant manager testified at the hearing in this case that there were four persons whose status as in or out of the unit was still in dispute (R. 47-48, 52-53), and the Union representative testified that as many as "30 or 40 people" had been in dispute (R. 88). The Trial Examiner, resolving the conflict on the basis of credibility, found that there was "no evidence of a persuasive nature that it [the payroll for August 30, 1957] does not include employees in any or all of some 9 or 10 *other* categories excluded in the October 10 contract" (R. 26, italics the Trial Examiner's). The Trial Examiner also ruled that there was no evidence as to whether or not any of the 120 persons in the list of persons working on July 29 but not on August 30 were actually in the excluded categories (R. 26).

From the foregoing it is apparent that even now we do not know how many employees were on the

payroll for August 30, 1957, if there are excluded mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, guards, truck drivers, engineers, maintenance men, and janitors (R. 26). We believe it may fairly be inferred the unit specified in the strike settlement memorandum, namely production and shipping employees would be read as excluding most, if not all, the thirteen categories listed in the October 10 agreement as specifically excluded. If these categories were all deducted from the 286 employees which the Board used as the basis of its determination that the Union did not in fact have a majority on August 30, 1957, it might well turn out it did in fact have a majority (R. 4-5).

In making its calculations (R. 4-5) the Board failed to deduct the 25 employees admittedly hired as strike-breakers and whom the Employer regarded as purely temporary (R. 26; 88-90), and the seven probationary employees (R. 82-83). Deducted from 286 employees, this leaves 254 employees. Adding the 88 strikers makes 342 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors." The Union had 186 valid authorization cards on August 30, although it later turned out 28 of these were not current employees on August 30 (R. 58-61, 123-128). But even excluding the 28, though there was no way the parties could reasonably have been expected to exclude these 28 in their calculations on August 30, if 27 of the 342 on the payroll were in the 13 excluded categories, the Union's 158 cards constituted a majority of the unit. It seems likely the group of mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, truck driv-

ers, engineers, maintenance men and janitors on August 30, 1957, exceeded 27 in number.

We have not brought before this Court the issue of whether the Union actually had a majority on August 30, 1957, however, as we think it is irrelevant and that the good faith belief of the Employer and the Union is controlling. We merely advert to these features of the record, to illustrate how unworkable it would be to make the duty of an employer and a union to bargain collectively dependent upon their accurate count of employees in the unit and of currently effective authorization cards. Significantly, the Trial Examiner was unable to find that the Union did not have a majority and held that the General Counsel had failed to sustain his burden of proving that the Union in fact had only a minority designation. If the Trial Examiner and the Board can thus disagree after careful consideration of a detailed record, surely the parties ought not to be bound to a higher standard of computation.

Especially in strike situations and often in other collective bargaining situations where employees are restive and threatening to strike, for either an employer or a union to insist on all the investigation of facts and securing of legal opinions necessary to an absolutely accurate determination of majority, would lead to prolonging strikes or bringing on of strikes which could be avoided. Where a strike is not in progress or threatened, delays incident to factual investigations into majority and the securing of legal opinions as to inclusions and exclusions can be most disruptive of employee morale and tend to a deterioration in production, labor turnover and generally bad employment relationships.

To make the validity of bargaining relationships depend upon the actual existence of a provable majority encourages employer trickery. To settle a strike, the employer can represent his payroll at a low figure and once the strike is settled, upset the settlement by revealing a large number of employees in the unit. Cf. *Sierra Furniture Co.*, 1959, 123 N.L.R.B. 1198, 1211. Indeed, in the instant case the Trial Examiner stated that both the testimony and demeanor of the Employer's Production Manager Kovalski "raised more than a faint suspicion that he felt it to be his interest to admit" non-existing coercion "in order to get the contract set aside" (R. 29). It should also be noted that the Employer was not sufficiently interested in protecting the contract to file a brief or participate in the proceedings in the court below except to file an answer (R. 130-131).

Also, if an employer must make an absolutely accurate determination of majority, he will necessarily learn the identity of some or all of the union members. This is true whether an employer insists on a check of authorization cards by himself personally or by a neutral person. If in connection with a card check conducted by a neutral person, the employer is called upon to state the employee status of Mary Jones who is not on the payroll because she is off on maternity leave, the employer will know Mary Jones has signed a union card. Such knowledge acquired by interrogation or surveillance would otherwise be an unfair labor practice. It is understandable that unions are reluctant to subject recently organized employees to such scrutiny and possible retaliation, when there is the possibility that the card check will fail to result in recognition of the union.

To make collective bargaining a workable part of modern industry, employers and unions must be able to proceed on the same good faith determinations from the evidence immediately at hand as businessmen usually use in entering into business dealings with the agents of other business entities. This Court in *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 526, in holding that employers must reduce to writing and sign collective bargaining agreements, recognized the applicability to the collective bargaining process of the usual practices which businessmen use in dealing with each other. To hold that a good faith determination of majority status is insufficient makes the prerequisites to collective bargaining so cumbersome as to discourage use of the collective bargaining process.

D. Good faith as a standard for determining majority affords adequate protection against infringement on employee rights through sweetheart agreements or favoritism among competing unions.

The standard of good faith inherently excludes sweetheart agreements and contracts entered into with one union to give it an advantage over a competing union. Unless an employer or a union has made an honest and reasonable determination of majority based on the evidence readily at hand, the employer or the union has not exercised good faith. For an employer to decide a union had a majority where the evidence showed the employer had no reasonable basis for such belief but rather was acting out of a desire to select or impose a bargaining representative on his employees would fall far short of good faith. In a situation of competing unions, unless the evidence overwhelmingly establishes one of the unions as a majority choice, it may well be that the only good faith course for an employer is to require an election before according either union exclusive recognition. Compare *Midwest*

Piping & Supply Co., Inc., 1945, 63 N.L.R.B. 1060, 1069-1071.

All of the definitions of good faith agree that honesty of motive is an essential ingredient. See for instance the following statement of Circuit Judge Learned Hand in *N.L.R.B.* v. *James Thompson & Co.*, 2 Cir., 1953, 208 F. 2d 743, 745-746:

> "'Good faith' is one form of credibility; it means that the motive that actuated the conduct in question was in fact what the actor ascribes to it: *i.e.*, that what he gives as his motive was in truth his motive. Applied to the case at bar, it means that, when Flanagan said to Cohen, and repeated on the stand, that he did not know whether Cohen had secured a majority and that he wished to find out, he was telling the truth about what he believed."

The good faith standard would always exclude an employer from recognizing a union as the exclusive bargaining representative of his employees because the employer wanted them to be represented by the union rather than because the employer honestly believed a majority of them had selected a union. This standard therefore accords employees full protection against having a union thrust upon them as their exclusive bargaining representative because an employer wants to choose the union with which he will deal. It leaves the Board full power in each case to judge the employer's and the union's conduct on the basis of their honesty and reasonableness in determining majority under all the circumstances of the situation in which they acted.

In the instant case the Trial Examiner found from uncontroverted evidence that (R. 26):

> "* * * it should be emphasized that in this case there is no 'sweetheart' contract element. At no time, so far as the record shows, was there any other labor organization in the picture. For a period of some 8 to 9 months before the strike the Union had been organizing employees—not 'organizing the employer,' and actually in the face of open opposition on the part of the employer."

This was not the typical situation proscribed by Section 8 (a) (2) of the Act. An examination of the legislative history of this section reveals that Congress closely scrutinized Section 8 (a) (2) at the time of the Taft-Hartley Amendments, for Section 10 (e) was amended to guarantee equal treatment for affiliated and independent unions. But Congress significantly did not change the wording of Section 8 (a) (2). It still left this unfair labor practice proscribed in its prior form: "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *." In Section 8 (2) of the Wagner Act, as the legislative history shows conclusively, Congress was dealing only with the "company-union problem" (S. Rep. No. 573, on S. 1958, 74th Cong., 1st Sess., p. 9, 2 Leg. His. N.L.R.A. 1935, p. 2309). The Senate Report clearly stated that this provision was "designed to prevent interference by employers with organizations of their workers that serve or might serve as collective bargaining agencies" (S. Rep. No. 573, p. 10, 2 Leg. His. N.L.R.A. 1935, p. 2309). The committee referred to participation by employers in framing union by-laws, participating in internal management of labor organizations and the like, stating (S. Rep. No. 573, p. 10, 2 Leg. His. N.L.R.A. 1935 p. 2310):

> "The committee feels justified * * * in outlawing financial or other support as a form of unfair

> pressure. It seems clear that an organization or a representative or agent paid by an employer for representing employees cannot command, even if deserving it, the full confidence of such employees."

The report then noted (as did the corresponding H. Rep. No. 1147, on S. 1958, 74th Cong., 1st Sess., p. 17, 2 Leg. His. N.L.R.A. 1935, p. 3066) that the "decision to prevent company interference with employee organization" was influenced by the fact that "70 percent of the employer-promoted unions have sprung up since the passage of Section 7(a) of the National Industrial Recovery Act" (S. Rep. No. 573, p. 11, 2 Leg. His. N.L.R.A. 1935, p. 2310). Section 8 (a) (2) was thus never intended to invalidate an arm's length contract, where the company's conduct toward the union was just the opposite of domination and support.

The recognition of a union as the exclusive collective bargaining representative where both the employer and the union believe in good faith that the union has been designated by a majority of the employees does not in fact constitute interference, restraint or coercion of employees or support to a union. The subjective element of employer favoritism with its ill effects on employee freedom which has been relied upon by the Board in cases where the employer seeks out a union and confers exclusive recognition or favors one of two competing unions with exclusive recognition is absent when the employer confers recognition in a good faith belief that the union has been chosen by a majority. Where, as in the instant case (R. 22; 90), the employer has been fighting the union, and despite the employer's opposition, so many employees join the union that both employer and union believe the union has majority status, there can be no element of

restraint or coercion of non-union employees. Nor in either the eyes of the employer or the employees is the recognition viewed as support to the union. Rather it is nothing more than what the employer and the union believe is legally due. The grant of only what is legally due is not prohibited support. Such exclusive recognition is usually, as here, part of a genuine arm's length agreement providing increased wages and improved working conditions which are beneficial to all employees whether union members or not.

Circuit Judge Fahy, in the court below, relied in part on this ground in his dissent with respect to the Board's finding that the Employer had committed unfair labor practices. Circuit Judge Fahy stated (R. 139):

> "I believe it also follows that the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement. There was no rival union competing for recognition. Moreover, the employer was not interfering with the freedom of the employees by conferring exclusive recognition in furtherance of the employer's own preference for or desire to assist one union over another. * * *"

It has long been recognized that majority status is not necessarily a controlling desideratum; that there are competing considerations, for example, the need for stable industrial relations, which may outweigh it and may require bargaining by an employer with a minority union. The Board's contract-bar doctrine is one illustration (*infra*, p. 78). Another example is the requirement that an employer and a certified union bargain for at least a year after certification even when the union has admittedly lost its ma-

jority. *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103. If no unlawful interference, restraint, coercion or support results from recognizing and bargaining with an admittedly minority union as the exclusive representative in such situations, no such unlawfulness is present where there is a good faith but mistaken belief in majority.[20a]

For all of these reasons we believe that the good faith standard, which the Board and the courts have, as far as we can ascertain, uniformly followed except in the instant case, is the proper standard. It was applied by the Trial Examiner in the instant case. It should have been applied by the Board. If applied, it required the dismissal of the complaint.

II

COLLECTIVE BARGAINING BETWEEN AN EMPLOYER AND A MINORITY UNION DOES NOT CONSTITUTE AN UNFAIR LABOR PRACTICE BY THE EMPLOYER UNDER EITHER SECTION 8 (a) (1) OR (2) NOR BY THE UNION UNDER SECTION 8 (b) (1) (A) OF THE NATIONAL LABOR RELATIONS ACT

If we are correct that good faith is the proper standard by which to judge an employer and a union with respect to the validity of their determination of majority, that alone suffices to dispose of this case. But even

---

[20a] It should also be remarked that Section 9 (c) (1) (A) of the Act contemplates a lawful recognition demand by a union which represents, not a majority, but merely "a substantial number" of employees. Indeed it is only if the employer "declines to recognize" this demand that the right to a representation election arises. See *Advance Pattern Co.*, 1948, 80 N.L.R.B. 29; cf. *N.L.R.B.* v. *Superior Cable Corp.*, 4th Cir., 1957, 246 F. 2d 539. Thus it appears that Congress contemplated lawful recognition demands by unions representing a "substantial number" rather than a majority of employees. It can hardly have been contemplated that if the employer agrees to recognize rather than "declines to recognize," an unfair labor practice results.

if the Board was correct in holding that the employer and the union acted at their peril in determining majority, we maintain that genuine arm's length bargaining by an employer with a minority union does not constitute an unfair labor practice by the employer under Section 8 (a) (1) or (2) or by the union under Section 8 (b) (1) (A) of the National Labor Relations Act.

In this connection we distinguish collective bargaining from exclusive recognition. As we explain more fully hereinafter, an employer and an admittedly minority union may properly engage in genuine arm's length negotiation and enter into collective bargaining contracts fixing wages, hours and conditions of employment for all employees in an appropriate unit. So long as such a contract contains no recognition clause or limits recognition of the union to representation of present or future members of the union it is entirely legal. We do not contend, however, that an employer or a union when the minority status of the union is known, can enter into a binding clause in a contract for a fixed term of time limiting the employer to recognition of the union as the exclusive representative of all his employees in the unit. While such a clause in a contract with a minority union could not be forced to bar the granting of exclusive recognition to a union chosen by the majority during the term of the contract, the clause does not invalidate the rest of the contract nor does its execution constitute an unfair labor practice by either the employer or the union.

A. There is no provision in the National Labor Relations Act which reasonably construed prohibits genuine arm's length bargaining between an employer and a minority union.

1. Section 7 of the National Labor Relations Act does not guarantee employees any rights which are infringed by genuine arm's length bargaining with a minority union.

Both the majority of the Board (R. 6) and the majority of the court below (R. 133-136) held that the Employer and the Union by entering into the strike settlement agreement of August 30, 1957, infringed upon rights guaranteed to employees by Section 7 of the National Labor Relations Act. The Board specified two rights which it deemed protected by Section 7 and infringed here. These it described as the right to be represented only by a majority union and the right to bargain individually (R. 6). In this respect the Board stated (R. 6):

> "* * * Section 7 of the Act guarantees to employees the right to form, join or assist labor organizations *of their own choosing* as well as the right to refrain from such activity. These rights must, of course, be reconciled with the rights of the majority of the employees in any unit. Section 9 (a) of the Act provides that the representative chosen by a *majority* of the employees in the unit shall be the exclusive bargaining representative of *all* the employees in that unit. Employees have, therefore, not only the right to be represented only by a majority representative but also the right to bargain independently and individually with their employer in the absence of a majority representative." [Italics the Board's.]

The majority of court below found that the right of freedom to choose representatives guaranteed by Section 7 was violated because the court assumed that a contract with a minority union would foreclose the

employees for the period of the contract from choosing a majority representative (R. 133-134). We have no quarrel with the court's construction of Section 7 as giving employees the freedom to choose a representative untrammeled by any limitations thereon imposed by any contract by the employer with a minority union but, as Circuit Judge Fahy dissenting below pointed out (R. 139), there is nothing in a contract with a minority union (where, as here (R. 3), no union security provision is included) which bars employees from complete freedom to join or not to join a union or to proceed the same as if the contract did not exist to get recognition or certification of a union as the exclusive bargaining representative once a majority agrees on a union. We discuss under Sub-paragraph 6 of this Point, pp. 76-79, *infra*, the certification procedures of Section 9 as affording any majority ample machinery for displacing minority contracts. As we there show a contract with a minority union constitutes no impediment to the Board conduct of an election irrespective of the term in the minority union contract. Nor does the existence of a minority union contract constitute any legal impediment to employer recognition of a union chosen by a majority as the exclusive bargaining representative. Hence our answer to the court below is that Section 7 does grant freedom to employees to choose a union but that a contract negotiated in genuine arm's length bargaining with a minority union, does not violate that freedom.

With respect to the rights deemed by the Board to be granted to employees by Section 7, namely the right to be represented only by a majority union and the right to bargain individually (R. 6), we respect-

fully submit that Section 7 does not grant either of these rights.

Section 7 provides:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Read literally there is nothing in the foregoing language which even suggests that employees have a right to bargain individually or to bargain only through a majority chosen union. Each employee who ever approached a Board office with a charge that he had been discharged by his employer as a result of his individual efforts at bargaining for himself has been summarily told that the Act only protects concerted activities.[21] In the few instances where complaints have issued in the belief that the individual was acting in concert with others rather than individually, unless the evidence established that the employer was aware of the concerted character of the activity before he discharged, the case has been dismissed by the Board [22] or its order set aside by the

---

[21] See Refusal to issue Complaint by General Counsel, Case No. SR-522, June 30, 1960, 46 L.R.R.M. 1255.

[22] See for example *Myers Products Corp.*, 1949, 84 N.L.R.B. 32; *Walls Mfg. Co.*, 1960, 128 N.L.R.B. No. 60.

courts.[23] Obviously Section 7 does not guarantee employees any right to bargain individually.

The legislative history of the Act establishes that the reasons for the failure to protect the right to bargain individually were three-fold: (1) the individual had such unequal bargaining power that he was helpless to bargain as an individual and had to accept whatever terms the employer dictated; (2) in modern industry, in each plant there can only be one scale of wages, hours and terms and conditions of employment which must be equally applicable to all workers similarly situated; (3) it is unworkable if management must spend its time negotiating with each worker. The situation which existed under individual bargaining was described by Bishop Francis J. Haas, a member of the National Labor Board established to administer Section 7 (a) of the National Industrial Recovery Act, during his testimony on the original Wagner Bill, S. 2926, 73d Cong., 2d Sess., as follows:[24]

> "Customarily, the wage relationship prior to June 16, 1933, was referred to as an individual bargain. In point of fact, among the overwhelming number of 48,000,000 workers in the United States there was no bargaining whatsoever. True, for approximately 10 percent there was union collective bargaining. Add to this the individual bargaining of a small percentage of nonunion skilled mechanics, but this was restricted for the most part to the busy seasons of the year. Out-

---

[23] *N.L.R.B.* v. *Office Towel Supply Co.*, 2d Cir., 1953, 201 F. 2d 838; *N.L.R.B.* v. *Westinghouse Electric Corp.*, 6th Cir., 1949, 179 F. 2d 507.

[24] Hearings before Senate Committee on Education and Labor on S. 2926, 73d Cong., 2d Sess., p. 116, 1 Leg. His. N.L.R.A. 1935, p. 146.

side these two groups, there was no bargaining at all of whatsoever nature.

"The great mass of workers were, at the time they were hired, simply told what they would get. Very frequently they were not even told. After employment, when piece rates were changed, the foreman simply announced the new rates. He could announce rates as low as he chose, limited only by the shortage of workers standing ready to take jobs. Briefly, the typical employer-employee relationship did not have even the appearance of trading or bargaining. The employer simply notified the worker what wages he was to get and the hours he was to work. * * *"

Senator Wagner during the hearings repeatedly described individual bargaining as "the trade name for exploitation." [25]

The sponsors of the Wagner-Connery Bills were uniformly vocal in pointing out the uniform wage scales prevalent under modern industrial practice and in criticizing the notion that the individual worker had any bargaining power unless he was organized into a union.[26] At the time of the Taft-Hartley Amendments, Senator Taft and other sponsors acknowledged the helplessness of the individual worker and the dic-

---

[25] Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 46, 1 Leg. His. N.L.R.A. 1935, p. 1422; Hearings before House Committee on Labor on H.R. 6288, 74th Cong., 1st Sess., p. 18, 2 Leg. His. N.L.R.A. 1935, p. 2492.

[26] Hearings on S. 2926, *op. cit.*, pp. 51, 938-939, 1 Leg. His. N.L.R.A. 1935, pp. 81, 976-977; Hearings on H.R. 6288, *op. cit.*, p. 200, 2 Leg. His. N.L.R.A. 1935, p. 2674; 79 Cong. Rec. 2332, 2333, 2335, 2337, 2438, 7680, 2 Leg. His. N.L.R.A. 1935, pp. 2412, 2430, 2431, 2433, 2434, 2438, 2441.

tation of terms by employers which prevail where the worker is unorganized.[27]

There can be no possible basis for construing Section 7 as protecting the right of an employee to bargain individually.

The notion expressed by the Board in this case that Section 7 guarantees to employees "the right to be represented only by a majority representative" (R. 6), is equally fallacious. It is well established that Section 7 guarantees employees the right to be represented by a minority union so long as the majority have not agreed upon one union. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 232, 236. There are numerous decisions by both the Board and the courts holding that an employer commits unfair labor practices by interfering with, restraining or coercing employees in the exercise of their right to be represented by a minority union.[28] While the Act does not impose upon the employer any duty to deal with a minority union, efforts by employees to obtain representation by a minority union in the absence of a majority union constitute concerted activities within the guarantee of Section 7 and hence protected from economic coercion by Section 8 (a) (1).

---

[27] 93 Cong. Rec. 7536-7537, 2 Leg. His. L.M.R.A. 1947, p. 1654; 93 Cong. Rec. 3428, 1 Leg. His. L.M.R.A. 1947, p. 621.

[28] *Douds* v. *Local 1250, Retail Wholesale Department Store Union of America*, 2d Cir., 1949, 173 F. 2d 764, 769; *Olin Industries, Inc.*, 1949, 86 N.L.R.B. 203, 206, 256, enforced 5th Cir., 1951, 191 F. 2d 613, certiorari denied, 343 U.S. 919; *National Linen Service Corp.*, 1943, 48 N.L.R.B. 171, 173, 219, 232; *Louis Rosenberg, Inc.*, 1939, 122 N.L.R.B. 1450, 1464; *Republic Steel Corp.* v. *N.L.R.B.*, 3d Cir., 1939, 107 F. 2d 472, 478, certiorari denied, 309 U.S. 684; *Agar Packing Co.*, 1949, 81 N.L.R.B. 1262, 1264-1265.

A reading of Section 7 fails to disclose any rights which are infringed by genuine arm's length bargaining with a minority union, where the resulting agreement contains no union security provisions and the substantive terms of the agreement are nondiscriminatorily applicable to union and non-union members alike. An employee is no less free to engage in self-organization, to form, join or assist labor organizations, or to bargain through a representative of his own choosing or to refrain therefrom because a minority of his fellow employees have joined a union and, after a strike, have convinced his employer to negotiate an agreement with the minority union according all of his fellow employees better wages, hours and working conditions. So long as the agreement contains no union security provisions, each employee, whether a member of the minority union or not, remains just as free after the agreement as he was before to engage in any form of self-organization, to form, join, or assist labor organizations or to engage in collective bargaining through representatives of his own choosing or to refrain therefrom. Nowhere in Section 7 is there any right specified which excludes an employer and a minority union from negotiating collective bargaining agreements.

Cases, such as this Court's decision in *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103, and *Medo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687, holding that an employer must continue to bargain with a union for a reasonable period, even though the union has lost its majority, establish that employees have no absolute right to be represented only by a majority union.

2. An employer by according exclusive recognition to, and bargaining at arm's length with, a minority union does not interfere with, restrain, or coerce employees within the meaning of Section 8 (a) (1).

There is nothing in the conduct of an employer in engaging in genuine arm's length bargaining with a minority union which interferes in the slightest with the right of any employee, whether a union member or not, to join or not to join that, or any other, union, or to engage, or not to engage, in concerted activities for mutual aid and protection.

Quite the contrary, collective bargaining with a minority union furthers the purposes of the Act to protect employees in their freedom to bargain collectively. Surely wages set by negotiations with some of the employees are to be preferred to wages set by employer fiat without negotiation with any of the affected employees. Where the majority of the employees have not selected a union, the employer is by law free to fix wages, hours and other conditions in any manner he in his uncontrolled discretion chooses to fix them. He may consult employer associations, personnel advisers or astrologists to find out what wages, hours or other conditions he should announce to his employees. Why can he not consult one, two, three or any number of his employees or fix conditions through negotiation with the only union which represents any of his employees? Is not genuine arm's length bargaining with a minority union better than no bargaining at all? Can it realistically be said such minority union bargaining, when the majority are not yet organized, deprives the majority of any rights?

The fact that some employees desire a union and the employer acquiesces in entering into a contract with

that union fixing wages, hours and working conditions, leaves all employees as free as before to select or not select that or some other union.

The legislative history of the Wagner Act shows that Congress in Section 2 (3) and (9) adopted the same definitions of "employee" and "labor dispute" as were included in Section 13 of the Norris-La Guardia Act, 29 U.S.C. 113, in order to protect unions from being enjoined from picketing at establishments where they had no members or only a minority because Congress approved of the efforts of labor organizations to eliminate the threat to union standards by competition from non-union plants. In House Report No. 1147, 74th Cong., 1st Sess., pp. 9-10, 2 Leg. His. N.L.R.A. 1935, pp. 3056-3057, the reason for these definitions is explained as follows:

> "The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee * * *."

The committee then proceeded to cite *American Steel Foundries* v. *Tri-City Trades Council,* 257 U.S. 184, 209, thus indicating an intent to guarantee the right of minority unions to picket for the purpose of changing wages and working conditions. The *Tri-City* case involved a Trades Council which represented less than a majority of the employees. The Council sought negotiations with the employer after wages were cut by amounts ranging from 2 cents to 10 cents per hour. The manager of the company responded that he "did not recognize organized labor and would not deal with the committee * * *" (257 U.S. at p. 196). Thereupon the Council called a strike and picketed the company.

The express refusal of Congress during its enactment of the Taft-Hartley Amendments to change these definitions shows its intent not to change the law with respect to the right of employers to recognize and bargain with minority unions. The definition of labor dispute in Section 2 (9) of the Wagner Act was retained in the Taft-Hartley Amendments as a matter of deliberate choice, having been omitted from the House Bill partly to reverse Board decisions holding that a labor dispute exists "whenever a union disagrees with an employer on any subject, notwithstanding that the union does not represent employees of the employer * * *" H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 18-19, in 1 Leg. His. L.M.R.A. 1947, pp. 309-310. The Senate version, which retained the Wagner Act definition, prevailed in conference, and in the bill. The Congress thus consciously adopted the Board's interpretation of "labor dispute" as including the "stranger" situation, and the present Board is merely trying to read the rejected House view into the statute.

If unions are to be protected in picketing employers, a majority of whose employees have not designated the union, employers certainly do not violate the law by avoiding such picketing by recognizing and bargaining with a minority union. As Judge Fahy, dissenting below, stated (R. 139):

> "* * * The strike was a peaceful one by the only union seeking recognition and bargaining status. The union lawfully obtained the settlement. It would frustrate the union's right so to do were it to be held that the employer, in agreeing to such a settlement, engaged on its part in an unfair labor practice which invalidated the settlement reached. Moreover, it seems to me that the contrary position requires an employer to suffer the consequences of

> a lawful strike without being able lawfully to bring it to an agreed end unless and until the union gains the adherence of a majority of the employees."

We see no way of reading the language of Section 8 (a) (1) as covering the conduct of an employer, where there are no competing unions, and where the employer deals at arm's length and not out of favoritism for one union, in granting exclusive recognition to, and entering into a genuine collective bargaining contract with, a minority union.

3. The type of union conduct prohibited by Section 8 (b) (1) (A) does not include accepting recognition and bargaining while a minority union.

This Court in the case of *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, fully reviewed the legislative history of Section 8 (b) (1) (A) of the Act and held that it does not bar strikes or picketing for recognition of a minority union. This Court determined that the objectives which Congress had in mind in enacting this Section did not encompass such a result as barring peaceful measures taken by a minority union to achieve recognition. This Court there said (362 U.S. at p. 290):

> "* * *8 (b) (1) (A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threat thereof * * *"

A peaceful request of a union for recognition followed by the signing of a contract when the employer agrees to grant recognition can by no stretch of the imagination be classified as "violence, intimidation, and reprisal or threats thereof." If anything, such claim making and contract signing are much further

removed from the type of conduct to which Section 8 (b) (1) (A) is directed than are strikes and picketing for recognition.

This Court in its decision in the *Curtis* case listed various Board decisions during the first decade after the passage of the Taft-Hartley Act, which gave Section 8 (b) (1) (A) the "limited application" which this Court characterized as "a sounder construction" of Section 8 (b) (1) (A) than the Board's construction in the *Curtis* case (362 U.S. at 290-291). In one of the cases so cited by this Court, *Miami Copper Co.*, 1950, 92 N.L.R.B. 322, 324, the Board dismissed a complaint alleging that a minority union had violated Section 8 (b) (1) (A) by striking and compelling the employer to deal with it in the adjustment of grievances in derogation of the rights of the certified majority union. The Trial Examiner in the *Miami Copper* case found that the employer violated Section 8 (a) (1) and (5) by dealing with the minority union. The Board sustained this finding without passing on its validity solely because the employer failed to file exceptions (92 N.L.R.B. at 324). In dismissing the Section 8 (b) (1) (A) allegations the Board said (92 N.L.R.B. at 324):

> "Where the union's conduct involved violence, threats thereof, or related conduct, or where the union had obtained or was attempting to obtain economic discrimination against particular employees, we have found such conduct proscribed by Section 8 (b (1) (A) No such factors are present here. Standing alone, the fact that the Union's conduct caused the Employer to violate a statutory right of the employees is not sufficient, in our opinion, to bring that conduct within the limitations which the legislative history requires we place on Section 8 (b) (1) (A)."

In the instant case both Board Member Fanning (R. 13-16) and Circuit Judge Fahy (R. 138-139) pointed out that a construction of Section 8 (b) (1) (A) as not directed at peaceful economic measures, such as was adopted by this Court in the *Curtis* case, precludes a finding such as the Board made here that a minority union violates Section 8 (b) (1) (A) of the Act by engaging in collective bargaining and executing an exclusive recognition memorandum.

We submit that this is the correct interpretation of Section 8 (b) (1) (A) of the Act.

4. An employer by according exclusive recognition to, and engaging in genuine arm's length bargaining with, a minority union does not grant it support within the meaning of Section 8 (a) (2).

Genuine bargaining with a minority union is no more support to the union than is genuine bargaining with a majority union. Support connotes the conferring of a financial benefit or some other special privilege demonstrating to the employees that the union enjoys the special favor of the employer.

As Judge Fahy, dissenting in the court below, stated (R. 139):

> "* * * the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement. There was no rival union competing for recognition. Moreover, the employer was not interfering with the freedom of the employees by conferring exclusive recognition in furtherance of the employer's own preference for or desire to assist one union over another."

Hard fought bargaining gains secured by a union as the result of a strike, whether majority or minority, cannot by any reasonable construction of the word support, be brought within that term. As we have set out

more fully (pp. 57-58, *supra*), Section 8 (a) (2), prohibiting support, was adopted by Congress in an effort to eliminate employer domination of company unions. It cannot properly be applied to bar genuine minority unions from negotiating with an employer in an arm's length effort to secure improved economic conditions for his employees.

5. The ban on union security agreements with minority unions contained in Section 8 (a) (3) indicates Congress intended to leave all other genuine agreements with minority unions valid as long as no majority union had been selected.

The express provision in Section 8 (a) (3) of the statute that a union security agreement must be made with a majority union would have been entirely useless if Congress had believed that the statute made all contracts with minority unions invalid. Section 8 (a) (3) of the Act in this respect provides:

> "* * * nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of the Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made * * *."

Singling out this one type of contract with minority unions for condemnation, by usual rules of *expressio unius est exclusio alterius*, shows that Congress deemed all other types of collective bargaining contracts with minority unions to be still permissible.

6. The certification procedures of Section 9 of the Act afford full protection to the right of employees to choose a majority representative unhindered by the existence of contracts with minority unions.

The majority of the court below found an infringement on the rights guaranteed to employees by Section 7 in the contract with a minority union on the assumption that it would deprive employees of the right to select a majority union as their representative until the contract expired (R. 133-134). There is nothing in the Act nor in the contract which compels this result. If the non-union employees are unhappy at being represented by the Union and doubt its actual majority, they can petition the Board for decertification or join another union and have it file a petition for certification. There is no need to add the unfair labor practice procedures to those that any dissenting employee already has available under Section 9 of the Act to free himself of an unwanted representative. The failure of the law to treat as an unfair labor practice the conduct of either the employer or the union in executing an exclusive recognition contract with a union which does not have majority status, does not mean that the Board must treat the contract as a bar to an election.[29] As Circuit Judge Fahy stated (R. 139):

---

[29] From an early date, the Board has followed the policy that "contracts with a labor organization which did not represent a majority of the employees, when made, are clearly no bar to elections." 7th N.L.R.B. Annual Report, 1942, p. 55. In *Stratbury Mfg. Co.*, 1939, 12 N.L.R.B. 618, 620-621, the Board ordered an election in a representation case, notwithstanding the existence of a contract, on a finding that the union did not have a majority on the date the contract was executed, although it later acquired a majority while the contract was in effect. For a recent case stating the rule that a contract recognizing a union as the representative of its members only is not a bar to an election see *Appalachian Shale Products Co.*, 1958, 121 N.L.R.B. 1160, 1164.

"My position does not mean that the recognition in the form given is protected should a majority of the employees at any time repudiate the union or choose another bargaining agent. On the contrary, any existing 'contract bar' policy or regulation of the Board is I think inapplicable to such a contract with a minority union, though made in such circumstances as are presented by this case."

Board Member Fanning, in his dissent in the instant case (R. 15-16), likewise emphasized the difference between Section 8 unfair labor practices and Section 9 procedures for selecting representatives:

"Section 9 of the Act specifically provides methods and procedures whereby employees can select or *reject* any union asserting a claim to be, or established as, their bargaining representative. The resolution of representation cases is a matter entirely within the discretion of the Board. It is in this forum that an employer's recognition or nonrecognition of a particular union is subject to defeasance or affirmation. Where the Board is satisfied that a question concerning representation exists, the Statute does not recognize any contract as a restraint upon the right of employees to make a choice for bargaining purposes. In the instant case the employees were free at any time to petition the Board for immediate decertification of the Union. The Board would then in its discretion decide whether or not the contract barred an election. A decision that the contract operated as an effective bar would, it is true, foreclose the holding of an immediate election, but this restraint upon the right of the employees to quickly repudiate an unwanted representative would be imposed not by the Statute, not by the Union, *but by the Board itself*. I cannot agree that the operation of discretionary Board rules

is sufficient to create an unfair labor practice where none would otherwise exist." (Italics Board Member Fanning's.)

The Board itself has regularly utilized its representation procedures to sort out the collective bargaining agreements which conform to the policy of the Act to provide stability through arrangements made by arm's length bargaining between employers and unions from those agreements which do not achieve this end. Where the Board finds the agreement is of the first kind it treats it as a contract bar to an election. If the contract does not fall in this category the Board directs an election. *Keystone Coat, Apron & Towel Supply Co.*, 1958, 121 N.L.R.B. 880. For a careful analysis of the Board's rulings in this regard see William Feldesman, Contract Bar to Representation Elections, 29 Geo. Wash. L. Rev. 450, December 1960. There the Board's contract-bar policies are summarized as follows (at pp. 451, 464):

> "Essentially, the principles of contract bar developed by the Board over a period of twenty-five years by constant evaluation and reappraisal, and trial and error, resulting in change and readjustment, a substantial amount of which has occurred recently, fall into two main categories. The first is concerned with whether or not the agreement actually stabilizes industrial relations in the manner contemplated by the act. If not, there is no cogent reason to deny an election. And the second involves the appropriate time to conduct an election, granted the contract is of sufficient stature to inject genuine stability in the bargaining relationship and is therefore formidable enough otherwise to preclude a Board-directed vote by the affected employees. For the Board has determined broadly that, while for reasonable periods contractual re-

lationships must remain undisturbed * * * at appropriate intervals employees must be afforded the opportunity to express themselves and register their desires on the question of their representation for collective bargaining purposes. * * *

* * *

"Depending on time and circumstance, the Board as a policy matter may wish to give freedom of choice more weight than stability, or to effect the converse, in working out an accommodation between these two basic statutory concepts. Through the vehicle of the contract bar doctrine the Board may follow whichever course it has thought it wise to pursue." (Footnotes omitted.)

The availability of Section 9 procedures demonstrates that contracts with minority unions, either with exclusive recognition clauses or with members only recognition, do not constitute any impediment to establishing a majority representative, unless the Board itself elects so to administer Section 9 as to permit such contracts to serve as impediments.

B. The legislative history of the National Labor Relations Act shows that Congress intended to permit employers and minority unions to bargain collectively.

We believe that a careful consideration of the legislative history of the National Labor Relations Act establishes that Congress intended to, and by its enactment did, leave minority union bargaining (subject to one restriction, namely, a ban on a closed shop) permissive, in all situations where the mandatory majority union bargaining was inapplicable because a majority had not yet chosen a representative.

The majority rule concept had not been an ingredient of collective bargaining as it was practiced in England nor as it was practiced in the United States prior

to the Railway Labor Act Amendments of 1934 (48 Stat. 1185) and the Wagner Act of 1935 (49 Stat. 991). Then Secretary of Labor Perkins testifying in the hearings on the bill which became the National Labor Relations Act, ascribed the term "collective bargaining" to Beatrice and Sidney Webb. In this respect Miss Perkins testified:[30]

> "The term 'collective bargaining' arose in the early nineties in England, when the trade unions began to come prominently to the foreground, trying to make arrangements with the employers, which covered all of their people in a plant.
>
> "I understand it was Beatrice and Sidney Webb who originated the term 'collective bargaining.' The term seemed appropriate since the workers were no longer carrying on individual negotiations with the employer, but they attempted to get agreements with regard to their work as a group rather than individuals, and the same rule was to apply to all of the groups rather than to apply to John Jones and Sam Smith."

In their writings describing collective bargaining in England the Webbs make it clear that it was not a prerequisite to collective bargaining that the union be designated by a majority and admittedly was in prominent instances a minority union.[31] Interestingly the Webbs point out that exclusion of non unionists from the plant occurred when a majority membership was secured.[32] In this country, unions and employers who conducted their employment relations on the basis of

---

[30] Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 57, 1 Leg. His. N.L.R.A. 1935, p. 1433.

[31] Sidney and Beatrice Webb, Industrial Democracy, 1920 ed., pp. 178, 209-212.

[32] *Id.*, p. 215.

collective bargaining prior to the Railway Labor Act Amendments of 1934 and the Wagner Act of 1935, did not concern themselves with whether a majority of the workers affected adhered to the union. While the statement has on occasion been made that the War Labor Board during World War I followed majority rule, in fact the Board did not give any consideration to whether or not a union had been chosen by a majority. Where employers had dealt with unions prior to the war, the Board required them to continue to do so. For unorganized plants it ran elections on the basis of one representative per each one hundred employees.[33]

At common law an employer could bargain with any union, whether or not it represented any of his employees, with respect to whom he might hire and on what terms. While this contract might not bind non-consenting employees contractually, the employer could be held in damages for its breach, if the state recognized contracts with unions as valid and enforceable.[34] In the numerous cases prior to 1935, dealing with collective bargaining contracts at common law, no mention has been found of whether or not the union had a majority designation when it negotiated the contract. In subsequent cases, the courts have stated that employees had a common law right to bargain individually or through unions of their own choice, whether minority or majority. For cases expressly holding that employees at common law had a right to bargain through a minority union see *Douds* v. *Local*

[33] See Russell A. Smith, The Evolution of the Duty to Bargain Concept in American Law, 39 Mich. Law Rev. 1065, 1069-1070 (May 1941); National War Labor Board Bulletin on Procedure, approved October 4, 1918.

[34] See for example *Greenwald* v. *Chiarella*, 1946, 271 App. Div. 213, 63 N.Y.S. 2d 49.

1250, Retail Wholesale Department Store Union, 2 Cir., 1949, 173 F. 2d 764, 769; *Eastwood-Neally Corp.* v. *I.A.M.,* 1938, 124 N.J. Eq. 274, 281, 1 A. 2d 477, 481-482.

In the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.,* Congress had expressly defined "person participating or interested in a labor dispute" and "labor dispute" so as to embrace disputes between an employer and a union which had none of his employees as members. Section 13, 29 U.S.C. 113. The purpose of these definitions was to leave unions free to picket for recognition and contracts at establishments where they did not have a majority, in order to protect standards in union shops from the competition of non-union shops. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504, n. 24; *United States* v. *Hutcheson,* 312 U.S. 219, 231, 232; *Fur Workers Union, Local 72* v. *Fur Workers Union, Local 212,* 1939, 70 App. D.C. 122, 105 F. 2d 1, affirmed, 308 U.S. 522.

The original Wagner-Connery Bills as introduced in Congress in February 1934 made only one mention of majority, namely, that a closed shop was invalid unless made with a majority union. This mention appeared in the proviso to Section 5 (6) and insofar as relevant here read as follows:[35]

> "* * * nothing in this Act shall preclude an employer and a labor organization from agreeing that a person seeking employment shall be required, as a condition of employment to join such labor organization * * * if such labor organization is composed of at least a majority of such employers' employees * * * "

[35] Section 5 (6) of S. 2926, 73d Cong., 2d Sess., pp. 5-6, 1 Leg. His. N.L.R.A. 1935, pp. 3-4; Section 5 (6) of H.R. 8423, 73d Cong., 2d Sess., p. 6, 1 Leg. His. N.L.R.A. 1935, p. 1131.

Senator Wagner in connection with this proviso expressed his understanding that under existing law collective bargaining agreements with minority unions were valid, even those including closed shop provisions. In this regard Senator Wagner stated on the floor of Congress preceding enactment, as follows:[36]

> "The virulent propaganda to the effect that this bill encourages the closed shop is outrageous in view of the fact that in two respects it actually narrows the now-existing law in regard to the closed-shop agreement. In the first place, while today an employer may sign a closed-shop contract even with a minority group, the bill provides that he shall be allowed to negotiate such an agreement only with an organization which represents the majority of employees in the appropriate collective bargaining unit covered by such agreement when made."

The original Wagner-Connery Bills as introduced in 1934 proposed generally the scheme ultimately adopted except that there was no provision making the union chosen by a majority the representative of all the employees. Section 5 (2) made it an unfair labor practice for an employer "to refuse to recognize and/or deal with representatives of his employees, or to fail to exert every reasonable effort to make and maintain agreements" and Section 207 (a) empowered the Board to certify representatives,[37] but there was no standard fixed for determining representatives. Congressman Connery, who in addition to being the sponsor of the bill in the House was also chairman of the House Committee on Labor which held hearings and reported the bill, later indicated his belief that

[36] 79 Cong. Rec. 7570, 2 Leg. His. N.L.R.A. 1935, p. 2335.

[37] 1 Leg. His. N.L.R.A. 1935, pp. 3, 11, 1130, 1137.

where there was no majority union but several minority ones, the largest minority union should serve as the representative for purposes of making the collective bargaining contract.[38]

Hearings on the first Wagner Bill began on March 14, 1934 and continued during the ensuing six days. Professor Summer Slichter appearing as one of the first witnesses in support of the Wagner Bill on March 14, 1934, suggested an amendment providing for certification of the representative chosen by the majority, with all bargaining agreements with minority unions entered into within one year after a majority representative had been certified valid only if approved by the certified union. His proposed amendment in the latter regard read as follows:[39]

> "* * * After certification of representatives of employees by the National Labor Relations Board, it shall be an unfair labor practice for the employer at any time within a year of the election, to bargain with other persons purporting to represent the employees, without submitting any agreements to the certified representatives either for approval or for further negotiation, and no agreement governing wages, hours or working conditions made within one year of the certification of employee representatives by the National Labor Board shall be binding on the employees, unless approved by the certified representatives."

There was however no sentiment expressed against genuine bargaining by any organized group in the ab-

---

[38] Hearings before House Committee on Labor on H.R. 6288, 74th Cong., 1st Sess., p. 63, 2 Leg. His. N.L.R.A. 1935, p. 2537.

[39] Hearings on S. 2926, *op. cit.*, p. 63, 1 Leg. His. N.L.R.A. 1935, p. 93.

sence of a majority. Most of the early witnesses did not mention majority rule but argued solely for collective rather than individual bargaining. Typical is the following testimony of Professor Robert L. Hale, who testified on the second day of the hearing.[40]

> "* * * If a man wants to work in a steel plant, he does not just go out and work according to his own ideas about how it should be worked; he has to join an organization. Normally, in the case of a steel plant, he becomes an employee of a steel company, and then he has no freedom as to the details of his work whatever; he is a non-voting member of a society. Now, if he belongs to a union in a closed-shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.
>
> "Now, of course, any system of organization is liable to have faults at times. A union itself may possibly have faults, and sometimes it has been oppressive of its members, but it is in any event a choice between evils. Government of any sort has certain evils, or may have at particular times, but the only alternative is anarchy, where the evils would be much greater. If he is subject to be governed by the rules of his union he presumably has a little more control over what those rules are than if he is governed solely by the rules laid down by his employer. So I think the moment you reflect a little bit on that notion of individual freedom, you see that it breaks down."

On March 26, 1934, the then pending auto strike was settled with an announcement from President

---

[40] Hearings on S. 2926, *op. cit.*, p. 51, 1 Leg. His. N.L.R.A. 1935, p. 81.

Roosevelt stating that proportional representation was to be used to establish bargaining committees."

From thence forth the hearings were filled with arguments and proposed amendments by sponsors of the bill in favor of compelling employers to confer exclusive bargaining rights on the majority representative. Miss Perkins explained the introduction of the majority rule concept into collective bargaining as having occurred quite accidentally by one of the Boards operating under Section 7 (a) of the National Industrial Recovery Act of 1933 (48 Stat. 198). Thus she testified:[42]

> "What I want to point out is that the first steps of the original Labor Board, which was appointed rather hastily, to solve questions under section 7 (a), was along the line of conciliation.
>
> * *
>
> "There was then one instance where the employer held the view that his employees did not wish to be represented by the union which was claiming to represent them, and some member of the Board suggested in a perfectly simple way, why not take an election, take a vote, and see whether they want to be represented by this unit or not. The vote was taken, and at that time no one ever raised the question as to whether the majority ruled or not. It was taken for granted that in elections the American habit is so fixed upon the idea that the majority rules, that the question was not raised.
>
> "It was only after several such elections had been held that someone who was displeased with

---

[41] 78 Cong. Rec. 5384, 1 Leg. His. N.L.R.A. 1935, p. 1067.

[42] Hearings on S. 1958, *op. cit.*, p. 58, 1 Leg. His. N.L.R.A. 1935, p. 1434.

the result of the election when the election indicated that the majority of the people in the plant desired to be represented by the outside union, that it was suggested that the minority group within that plant had no direct way of representation.

"We began then to have this discussion and debate as to whether or not the majority did have a right to speak for all of the employees in the plant or not, and this issue came to be an issue which was debated publicly as well as in the circle of those who had the responsibility for bringing about a fair and proper adjustment with the various plants."

No one suggested that in the absence of a majority choice, an employer and a minority union were in any respect, except as to a closed shop, to be inhibited from bargaining collectively. The extreme care with which each statement respecting bargaining with minority unions as constituting an unfair labor practice is expressly limited to the time after a majority union has been selected, manifests that bargaining with a minority union prior thereto is permissible. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20, 2 Leg. His. N.L.R.A. 1935, pp. 3069-3070, states:

"Section 9 (a) incorporates the majority rule principle * * * As a necessary corollary it is an act of interference (under Section 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individual or minority groups in their behalf on the basic subjects of collective bargaining."

S. Rep. No. 573, 74th Cong., 1st Sess., p. 13, 2 Leg. His. N.L.R.A. 1935, p. 2313, similarly states:

"Majority rule carries the clear implication that employers shall not interfere with the prac-

> tical operation of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all. * * *".

Senator Wagner and all the other sponsors of the legislation similarly carefully limit the time of prohibition on minority union bargaining to the period after a majority union has been chosen.[43] The prohibition on minority union bargaining after a majority union had been designated was not based on any concept that bargaining with a minority union was inherently wrong but rather on the basis that there must be only one agreement applicable to all employees in the unit and that an agreement made by the majority was to be preferred to one made with a minority. In this respect Dean Lloyd K. Garrison, then Chairman of the National Labor Relations Board operating under Public Resolution No. 44, 73d Cong., 2nd Sess.,[44] testified as follows:[45]

> "Here is a collective bargaining unit, let us say, for the sake of simplicity, a plant; all of the men in the plant are doing more or less the same kind of work. If a collective agreement regarding wages and hours is to be worked out with the employer it must necessarily apply to everybody in that unit, everybody in the plant. So that it is not a question of negotiating an agreement with this little group or that little group, because no such agreement is practical. An employer cannot

---

[43] 78 Cong. Rec. 3443, 1 Leg. His. N.L.R.A. 1935, p. 16; 79 Cong. 7571, 2 Leg. His. N.L.R.A. 1935, p. 2336.

[44] 78 Cong. Rec. 12453, 1 Leg. His. N.L.R.A. 1935, p. 1255B.

[45] Hearings on S. 1958, *op. cit.*, p. 127, 1 Leg. His. N.L.R.A. 1935, p. 1507.

> give one set of wages and hours to one group and another set to another where they are all doing the same type of work. It has to be an agreement applying to all. Then the only question is where there are two groups of employees, a majority and a minority group, with which shall the agreement be negotiated? It cannot be negotiated with both, because there is going to be only one agreement, and it is to apply to everybody. Is it at all sensible that the employer should negotiate that agreement applying to everybody with the group which represents the fewest employees? That is obviously silly. And it could only lead to trouble and to strife. As a practical matter he must negotiate it with the majority, with the group that represents the bulk of the employees."

Numerous other witnesses gave a similar explanation of their advocacy of mandatory exclusive bargaining with the union chosen by a majority.[46]

Opponents of the Act recognized that the Act protected employees in their efforts to secure minority union bargaining where no majority had yet been established. Harvey J. Kelly, representing the American Newspaper Publishers Association, testified:[47]

> "There is nothing in this bill which would require a union failing to obtain a majority in an election, to abide by the result of that election and cease its efforts to enforce its wishes upon

---

[46] Senator Wagner, Hearings on S. 1958, *op. cit.*, p. 43, 1 Leg. His. N.L.R.A. 1935, p. 1419; Senator Wagner, Hearings on H.R. 6288, *op. cit.*, p. 16, 2 Leg. His. N.L.R.A. 1935, p. 2490; Francis Biddle, Hearings on S. 1958, *op. cit.*, p. 81, 1 Leg. His. N.L.R.A. 1935, p. 1457; Dr. Harry A. Millis, Hearings on S. 1958, *op. cit.*, p. 180, 1 Leg. His. N.L.R.A. 1935, p. 1560.

[47] Hearings on S. 1958, *op. cit.*, p. 635, 2 Leg. His. N.L.R.A. 1935, p. 2021.

> both the employees who have rejected its program and the employer."

To the same effect see the Memorandum submitted by the Automobile Manufacturers Association, which stated:[48]

> "In actual practice this means that the labor union accepts the majority rule where it happens to have a majority of the employees in its membership but is not bound by majority rule where the union is in a minority."

We have read the legislative history of the original National Labor Relations Act with great care looking for any expression of a desire to ban genuine collective bargaining with a minority union where no majority union exists and have not been able to find any. Indeed, in the climate of opinion then existing among the Congressmen who supported the legislation, it is unthinkable that they intended to place any inhibition on the only then established form of collective bargaining. They were attempting to further collective bargaining. While they made it mandatory only when a majority chose a union, they meant to protect workers in their efforts to secure majority bargaining by beginning with permissive bargaining on a minority basis where a majority organization had not been achieved.

The legislative history of the Labor Management Relations Act of 1947 likewise contains nothing to indicate that Congress wished to ban employees from bargaining collectively through a minority union when they had not yet achieved majority organization. Sen-

---

[48] Hearings on S. 1958, *op. cit.*, p. 608, 2 Leg. His. N.L.R.A. 1935, p. 1994.

ator Taft, who sponsored the amendments in the Senate, repeatedly recognized the helplessness of the individual worker without organization and stated there was nothing in the proposed amendments which changed the full support for collective bargaining present in the original statute.[49] Other Congressmen supporting the Taft-Hartley Amendments made similar statements.[50] While no one expressly stated that minority union bargaining was legal, the implication of statements such as Senator Ellender's that "Collective bargaining was made compulsory, if a union had a majority of the employees in a certain plant," [51] is that collective bargaining remains permissive where a union has as yet only a minority and there is no other union with a majority.

Finally, and most conclusive respecting the Taft-Hartley Amendments, is the fact that they added no new employer unfair labor practices. The only unfair labor practice of unions adopted by the Taft-Hartley Amendments which supposedly applies to ban minority union bargaining, namely, Section 8 (b) (1) (A), has been construed by this Court as inapplicable to this type of union conduct. *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, 290.

For the foregoing reasons we submit that the legislative history of the National Labor Relations Act, as amended, supports our view that there is no provision in the Act which construed reasonably makes it

---

[49] 93 Cong. Rec. 3834, 4194, 4361, 4446, 4580, 4675, 7536-7537, 2 Leg. His. L.M.R.A. 1947, pp. 1005, 1098, 1169, 1225-1226, 1244, 1300, 1653.

[50] 93 Cong. Rec. 3428, 3529, 1 Leg. His. L.M.R.A. 1947, pp. 621, 696.

[51] 93 Cong. Rec. 4131, 2 Leg. His. L.M.R.A. 1947, p. 1055.

an unfair labor practice for an employer to grant exclusive recognition to and engage in genuine arm's length bargaining with a minority union in the absence of a majority union.

C. During the decade following the enactment of the National Labor Relations Act bargaining with minority unions was a generally accepted and widely practiced form of collective bargaining.

In the years immediately following the enactment of the National Labor Relations Act many of the most outstanding collective bargaining agreements of the period were made with minority unions. The agreements made by General Motors Corporation and Chrysler Corporation with the United Automobile Workers, C.I.O., on March 12, 1937 settling the sit-down strikes [52] and the agreement made by the United States Steel Corporation with the Steel Workers Organizing Committee on March 17, 1937,[53] were admittedly collective bargaining agreements with unions that had not established a majority status. These contracts fixed wages, hours and conditions of employment for all employees in the appropriate units although the union was only recognized as the representative of its members.

This form of collective bargaining was prevalent in auto, steel and many other segments of American in-

[52] General Motors-Auto Workers Contract, 2 L.R.R. Man. 959; Chrysler-Auto Workers Contract, 2 L.R.R. Man. 964; Herbert Harris, American Labor (1939) pp. 297-303; Robert R. R. Brooks, When Labor Organizes, Yale Uni. Press, 1937, p. 15.

[53] The Twentieth Century Fund, How Collective Bargaining Works, 1942, pp. 522-523; Myron C. Taylor, Ten Years of Steel, pp. 23-45; Labor Relations of United States Steel Corporation, 2 L.R.R. Man. 1009, 1014.

dustry for several years. The General Motors contracts with the UAW-CIO were renewed on a members only basis of recognition until in April 1940, the UAW-CIO won substantial majorities of plant workers in 49 General Motors plants. For the first time it was recognized by General Motors as the exclusive bargaining agent for all production and maintenance workers in the bargaining units in which it won elections.[54] A survey of collective bargaining in the automobile industry in 1938 showed that of 537 contracts entered into with the UAW-CIO, 343 recognized the union as the representative of members only.[55]

The United States Steel Corporation's contracts with the Steelworkers were likewise renewed for several years with a members only recognition clause.[56] Of the 445 contracts entered into by the Steel Workers Organizing Committee by December 15, 1937, 85 percent showed recognition for members only.[57] In 1938, of the 403 steel industry contracts signed (including renewals of expiring agreements) only 155, or 38 percent, limited recognition to members of the union. However, the United States Steel contracts remained in the for-members-only group. Of the 317 contracts

---

[54] Frederick H. Harbison, Patterns of Union-Management Relations, 1947, p. 22.

[55] U.S. Dept. of Labor Information Bulletin, Vol. 5, No. 6, William L. Munger, Bargaining in the Automobile Industry (1938), pp. 5, 7; 2 L.R.R. Man. 952, 953.

[56] Robert R. R. Brooks, As Steel Goes, Yale Uni. Press, 1940, pp. 166-167.

[57] Bargaining in the Steel Industry, 3 L.R.R.M. 853, 854; Frederick H. Harbison, Collective Bargaining in the Steel Industry, 1937, pp. 7-8.

signed in the steel industry in 1939, only 56, or 14 percent, stipulated recognition for members only.[58]

In collecting illustrative union recognition clauses a study in 1938 listed members only recognition in 13 instances and exclusive recognition in eight instances. Among the members only recognition were contracts between a rayon manufacturer and the Textile Workers Organizing Committee-CIO, between a silk manufacturer and the same committee, between a steel products manufacturer and two AFL unions, between a public utility and the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL, between a cement manufacturer and a Federal Labor Union of the Cement Workers, AFL, between a rubber manufacturer and the United Rubber Workers of America, CIO, between a public utility and the International Brotherhood of Electrical Workers, AFL, and between a publisher and an AFL union. That this was regarded as an accepted form of collective bargaining is apparent from the whole text of the article. The following statement is illustrative:[59]

> "The beginning point of collective bargaining in labor relations is the recognition by an employer of the other party to any contract entered into as the party representing employees.
>
> "Collective bargaining contracts therefore normally include in their first section a provision designating the spokesman for employees and defining the extent to which such spokesman will be recognized as representing the employees.

---

[58] Robert R. R. Brooks, As Steel Goes, Yale Uni. Press, 1940, p. 166.

[59] Union Recognition as Shown in Contracts, 1-A L.R.R. Man. 781-782.

"Such union-recognition clauses, as embodied in most recent contracts, generally fall into two different patterns.

"In some contracts, the union is recognized as the exclusive bargaining agent for all employees. In others, the union is recognized as bargaining agent for those employees only who are or may become members of the union.

* * *

"Of the excerpts from contracts appearing below, eight recognize the union as sole bargaining agent for all employees; thirteen recognize the union as spokesman for its members only. * * *"

An examination of studies of collective bargaining made during the late 30's and the 40's shows uniform acceptance of contracts with a minority union as a legitimate form of collective bargaining.

Similarly see Significance of Union Recognition, 2 L.R.R. Man. 936, 938:

"The Board has held, however, that it is not an unfair labor practice for an employer to refuse recognition to union representatives who do not represent a majority of the employees (1-A L.R.R. Man. 35), but neither is it an unfair labor practice for an employer to recognize a minority union as bargaining agent for its members only (1-A L.R.R. Man. 518)."

This practice during the years immediately following the enactment of the Wagner Act shows the prevalence and propriety of collective bargaining agreements with minority unions.

D. The decisions of this and other courts and the Board have held that bargaining with a minority union is not, without more, a violation of the National Labor Relations Act.

This Court in the case of *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 232, 236, upheld contracts executed on the basis of recognition for members only. This Court described the contracts as follows (305 U.S. at 232):

> "* * * the contracts * * * recognize the Brotherhood as the collective bargaining agency of the employees who belong to it * * *"

Although this Court sustained the findings of the Board that Consolidated Edison Company had interfered with, restrained and coerced its employees by acts of favoritism to the Brotherhood, an AFL union, and opposition to the CIO union, this Court held that these unfair labor practices did not invalidate the contracts with the Brotherhood and that the contracts were not otherwise illegal. In this respect this Court said (305 U.S. 197, 236-238):

> "Here there is no basis for a finding that the contracts with the Brotherhood and its local were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act * * *
>
> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining * * * there is nothing to show that the employees' selection as indicated by the Brotherhood contracts had been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the

> Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree * * * The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of the employees, would remove that salutary protection during the intervening period.
>
> "The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency * * * did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf."

In the case of *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, 549, n. 6, this Court quoted an interpretation advanced by the then Solicitor General and later Mr. Justice Reed, upholding the right of minority union bargaining under the Railway Labor Act, as follows:

> "* * * If the majority of a craft or class has not selected a representative, the carrier is free to make with any one it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions."

Likewise this Court's holding in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, that a minority union does not violate the Act by striking or picketing for recognition, seems implicitly to accept the validity of bargaining between an employer and a minority

union. This was pointed out by Circuit Judge Fahy, dissenting below, as follows (R. 138-139):

> "* * * The doubts which surrounded the problem presented by this case have been resolved, as it seems to me, by the necessary implications of the recent decisions of the Supreme Court in *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274, referred to as the *Curtis* case, and *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 329. The Court held in these cases that peaceful picketing, or a peaceful strike, by a union which did not represent a majority of the employees, to obtain immediate recognition as the exclusive bargaining agent in *Curtis*, or to obtain a contract in *United Rubber Workers*, was not an unfair labor practice under section 8 (b) (1) (A) of the Labor Management Relations Act of 1947, 61 Stat 136, 29 U.S.C. §§ 141-66 (1958). * * *
>
> "I believe it also follows that the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement. * * * The strike was a peaceful one by the only union seeking recognition and bargaining status. The union lawfully obtained the settlement. It would frustrate the union's right so to do were it to be held that the employer, in agreeing to such a settlement, engaged on its part in an unfair labor practice which invalidated the settlement reached. Moreover, it seems to me that the contrary position requires an employer to suffer the consequences of a lawful strike without being able lawfully to bring it to an agreed end unless and until the union gains the adherence of a majority of the employees."

Circuit Judge Learned Hand in a careful analysis of the statute came to the conclusion that where there was no contract with a majority union, bargaining with

a minority union was legal. In *Douds* v. *Local 1250, etc.*, 2 Cir., 1949, 173 F. 2d 764, 769, he stated:

> "The purpose or scheme, as so amended, seems to us consistent throughout. The certified agent's authority extends to all employees in the 'unit,' including those who have not voted for him; but his election and certification, as such, confer upon him only that authority; they do not, ex proprio vigore, affect the relations between the employer and the employees. They give him power to affect them by contract, but until he chooses to contract, and in so far as his contract leaves open any points in dispute, present or future, the employees retain their common-law right to bargain for themselves, singly or collectively. On the other hand, any bargain they may make is subject to his power to cancel it, for in so doing he acts for them as their agent, as much as though they had expressly authorized him to do so. His power to represent all within the 'unit' is absolute and beyond question; but it does not automatically exclude them."

In *Eastwood-Neally Corp.* v. *I.A.M.*, 1938, 124 N.J. Eq. 274, 281, 1 A.2d 477, 481, the court similarly construed the National Labor Relations Act as permitting minority union bargaining where the majority was not organized. The court said:

> "Neither the defendant union nor the employees' committee has been certified by the Board to be the majority bargaining representative. In the absence of such certification, an employer cannot shut his eyes to other evidence showing clearly who represents the majority. *National Labor Relations Board* v. *Remington Rand*, 2 Cir., 94 F. 2d 862. But in the instant case, complainant and defendant agree that there is no such evidence. In this state of doubt, did Congress intend that an employer must refrain from bargaining with either or both sets of putative representatives?

"Before the day of the statute, employers had, of course, the right to discuss with groups of their employees, wages, hours of employment, etc. Employers could use the information so obtained in making up their minds what terms to offer to their men; they could embody their conclusions in agreements. In the great majority of factories throughout the land, there was, when Congress acted, no labor union or other organization of workmen representing a majority of the employees. Congress probably hoped by the enactment to foster the growth of labor unions and anticipated that in most industrial units engaged in interstate commerce, a majority of the employees would unite in choosing some one labor union as their representative. * * * But no Congressional intervention can be discovered in the statute that when a majority of the employees have not, in fact, selected a bargaining representative, the employer shall refrain from ascertaining by conference—by 'bargaining'—the wishes of different groups of his employees.

* * *

"One more step reaches the situation before me: Rival claimants to the title of majority representative; and fair doubt whose claim is valid. Congress anticipated the case and empowered the Board to decide the issue. In the meantime during the weeks or months that may elapse before the Board is asked to act, or before it reaches a decision, and so long as there remains fair doubt who is the majority representative, the employer may, I believe, lawfully negotiate with anyone willing to confer. Congress aimed to promote and not to prevent collective bargaining. * * *"

The Board itself for many years held that bargaining with a minority union did not by itself constitute an unfair labor practice, although it stated, incorrectly we believe, that the grant of exclusive recogni-

tion would be improper. In *Consolidated Builders, Inc.*, 1952, 99 N.L.R.B. 972, 975, the Board reversed the findings of a trial examiner that an employer had violated Section 8 (a) (1) of the Act by entering into a contract with a minority union establishing wages, hours and working conditions for all employees in the unit. The Board said (99 N.L.R.B. at 975):

> "As it is not a violation of the Act for an employer to enter into an agreement with a union at a time when there is no representative complement in its employ *unless* the employer extends exclusive recognition to that union, it follows that the Respondent did not independently violate Section 8 (a) (1) of the Act by entering into the April 6 agreement with the Operating Engineers." [Emphasis the Board's]

"[5] In *The Hoover Company*, 90 N.L.R.B. 1614, 1618, the Board pointed out that an employer may grant recognition to each of two rival unions on a members only basis, a *fortiorari*, therefore, an employer may grant recognition on a non-exclusive basis to a minority union where, as here, there was no rival union claim."

In *Solvay Process Co.*, 1938, 5 N.L.R.B. 330, the Board dismissed a complaint charging unfair labor practices under Section 8 (1) and (2) of the Act, where the employer recognized for its members only a union which had not established its majority representation.

In many cases the strikers whom the Board ordered reinstated had been participants in strikes conducted by minority unions seeking recognition, e.g., *Cleveland Worsted Mills Co.*, 1942, 43 N.L.R.B. 545. In *Black Diamond S.S. Corp.* v. *N.L.R.B.*, 2d Cir., 1938, 94 F. 2d 875, certiorari denied, 304 U.S. 579, while an election was being held by the Board to determine which of two rival unions represented a majority of the men, one of the unions demanded that the company

bargain with it. The demand was ignored and the union called a strike. The court held that the men had a right to strike and that the strike did not prejudice their right to reinstatement. See also to the same effect *Columbia Pictures Corp.*, 1945, 64 N.L.R.B. 490, 510-515. In no case, so far as we have been able to ascertain, did the Board hold that it was an unfair labor practice for an employer and a minority union to negotiate a contract, so long as there was no union security clause, no rival union and no employer favoritism.

Even where there were rival minority unions and no majority union, the Board at one time held it was perfectly proper for an employer to bargain collectively and enter into contracts with a minority union so long as the contract recognized the union as the representative of its members only and so long as all unions were treated the same.[60]

The public and the labor members of the War Labor Board during World War II, accepted collective bargaining with a minority union as valid. The Board stated:[61]

> "* * * The majority of the Board recognizes that an agreement establishing collective bargaining rights for minority unions can, under certain circumstances, be legally entered into by parties."

In *Thompson Products Co., Inc.*, 1942, 4 W.L.R. 384, 390, the UAW-CIO had requested from the employer a members only contract and if that was not granted, at least recognition for representing its members in the

[60] *The Hoover Company*, 1950, 90 N.L.R.B. 1614, 1618, modified in other respects, 6th Cir., 1951, 191 F. 2d 380; 17th Annual Report N.L.R.B., 1952, p. 124.

[61] *Pacific Mills, Worsted Division*, 1943, 11 W.L.R. 239, 243.

processing of grievances. The War Labor Board, with Chairman William H. Davis, Frank P. Graham and Senator Wayne L. Morse sitting as public members, ordered the employer to grant the latter request stating:

> "* * * the company argues that it is its policy to deal only with a union representing the majority of its employees. Such a policy is not only sound, but is required by law, if a determination has been made as to whether or not any union does in fact represent a majority of the employees. However, no such determination has been made in this case and, therefore, the policy of the company cannot be considered as an argument against the recognition of even a minority union until such time as a majority representative has been chosen in accordance with the law, unless it can be demonstrated that such action would be otherwise improper."

E. To deny bargaining rights to a minority union leaves employees unable to protect themselves during the crucial period while they are organizing and trying to become a majority, makes it impossible to settle many strikes and has other undesirable consequences.

While the instant case is, so far as we have been able to ascertain, the first and only case in which it has been held that either an employer or a minority union committed an unfair labor practice by genuine arm's length bargaining involving neither union security provisions nor a rival union nor employer favoritism, there are expressions of Board doctrine in recent cases which show its thinking and illustrate the unworkable state of law which is developing. The dilemma posed for employers and unions by the rule of the decision below is not soluble under present Board doctrine. For many years, under the decisions described above.

a union and an employer faced with uncertainty as to the majority status of a union, could safely enter into a contract fixing rates of pay, hours and terms of employment for all employees within the unit, so long as the recognition accorded to the union was for its members only. But it is dubious if such a contract is ever valid under present Board doctrine. In *Max Factor & Co.*, 1957, 118 N.L.R.B. 808, 813, the Board pointed out that the General Counsel took the position that a members-only contract is *per se* violative of the Act. The Board there found it unnecessary to pass on the issue, as the members-only contract there had been preceded by an unlawful union security contract. In its order, however, the Board did forbid recognition "even limited to its members" until the union should win a Board-conducted election.

It is today settled that a members-only contract with a majority union is illegal because it violates the duty of a majority union to represent all employees.[62] A members-only contract even with a minority union is illegal if it provides different benefits for union than for non-union members.[63]

---

[62] See *N.L.R.B. v. Gaynor News Company, Inc.*, 2d Cir., 1953, 197 F. 2d 719, 722, where the court said: "The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation." This language was quoted with approval by this Court in affirming that decision, 347 U.S. 17, 37-38.

[63] *Newark Newsdealers Supply Co.*, 1951, 94 N.L.R.B. 1667, 1668-1669; Annotation: Unfair labor practices; discrimination between union members and non-members as to wage increases, vacations and the like, 41 A.L.R. 2d 654, 655-656, § 2. In general: where union bargains for its members only: *Jandel Furs*, 1952, 100 N.L.R.B. 1390, 1392-1393; *Seaboard Terminal*, 1955, 114 N.L.R.B. 1391, 1396.

The Board also holds that the inclusion in a contract, which recites it is for the members only, of the same provisions for all employees, establishes the contract as actually an exclusive recognition contract.[64] The error in these decisions is the assumption that the contract grants exclusive recognition to the union because it contains provisions making the wages, hours and terms of employment there established applicable to all employees in the unit. Applicability of conditions to all is one thing; exclusive recognition barring recognition of any other union is quite another. Congress intended that all contracts with unions fixing wages, hours and working conditions should be equally applicable to union and non-union members alike. The House Report on the bill which became the Wagner Act[65] stated:

> "* * * There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to non-members, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all"

[64] *Herff Jones Co.*, 1952, 97 N.L.R.B. 1070, 1071-1072; *Sunbeam Corp.*, 1952, 99 N.L.R.B. 546; *Alco-Gravure, Division of Publications Corp.*, 1959, 124 N.L.R.B. 1027, enforced by consent, 6th Cir., 1960, 45 L.R.R.M. 2899.

[65] H. Rep. No. 969 on H.R. 7978, 74th Cong., 1st Sess., p. 18, 2 Leg. His. N.L.R.A. 1935, p. 2928. See also H. Rep., *op. cit.*, p. 19, 2 Leg. His. N.L.R.A. 1935, p. 2929.

The Senate Report and numerous statements by sponsors of the legislation are uniformly to the same effect.[66]

There is nothing about the fact that the agreement provides that all employees in the unit shall have the same terms which means that the union is thereby recognized as the exclusive representative of all employees. Rather in the absence of an express grant of exclusive recognition, there is nothing in the fixing of rates and conditions for all employees which suggests they may not be represented individually or by any other union in bargaining for still better terms for themselves and all employees in the unit. The only sound legal difference between a majority union and a minority union, aside from union security, is that the majority union can make a contract which will bar another determination of majority for the term of the contract, and during that term exclude individual and other union bargaining. A minority union can negotiate the same contract so far as wages, hours and terms of employment are concerned but cannot properly bar a majority determination at any time.

To hold that a union has no power to bargain at all until it has a majority leads to many ludicrous results. Today, with strike breakers eligible to vote in union elections and hence presumably to be counted along with strikers in the unit unless it is clear the strike-breakers are merely temporary employees, it is often

---

[66] S. Rep. No. 730, on S. 1958, 74th Cong., 1st Sess., p. 13, 2 Leg. His. N.L.R.A. 1935, p. 2313; Hearings on S. 1958, 74th Cong., 1st Sess., pp. 43, 81, 875, 4 Leg. His. N.L.R.A. 1935, pp. 1419, 1457 2 Leg. His. N.L.R.A. 1935, p. 2261; Hearings on H.R. 6288, 74th Cong., 1st Sess., pp. 16, 278, 2 Leg. His. N.L.R.A. 1935, p. 2490, 2752; 79 Cong. Rec. 7571, 7672, 2 Leg. His. N.L.R.A. 1935, pp. 2336, 2390.

impossible to be at all certain in many strike situations that the striking union does have majority status. But if it is an unfair labor practice for an employer and a minority union to negotiate, the strike must drag wearily on with the employer and the union unable to negotiate its termination until the union gets a majority. That this is not a mere absurd hypothesis is evident from the fact that in at least one of the large strike settlements of the recent past, charges are on file with the Board attempting to upset the whole strike settlement on the basis that the AFL-CIO union a party to it was not the majority representative entitled to recognition by the employer when it was signed. *Wilson & Co.*, N.L.R.B. Cases Nos. 17-CA-1652, 1653, 1654, 18-CA-1167, 1168, 21-CA-4086.

In *Local No. 259, UAW* and *Famelli Ford Sales, Inc.*, Case No. 2-CP-48, Intermediate Report, December 21, 1960, 47 L.R.R.M. 138, the General Counsel issued a complaint alleging that a minority union by picketing to secure reinstatement of a discharged employee was seeking recognition on the theory that to get rid of the pickets the employer would have to recognize and negotiate with the minority union.

Traditionally unions have organized by proving their worth to their members and potential members through gains secured by agreements negotiated before full majority status was achieved. The Board's present policy ties the hands of unions so they can take no economic action to protect their members or improve their conditions until full majority status is achieved. This makes the problem of organizing a sizeable appropriate unit very difficult for members may have to go through a long organizing period before realizing any benefits from union membership. And

even worse, during this period they may often suffer economic coercion from the employer which historically would be met by direct action but which under present Board doctrine can only be remedied by slow technical proceedings before the Board.

The problem of organizing and achieving majority status is still a major one in the United States. The proportion of union members in the labor force today is about one out of four. The proportion of workers covered by collective bargaining agreements is estimated as about the same. The Department of Labor, Bureau of Labor Statistics, conducts biennial surveys of the growth of union membership and collective bargaining. The last survey conducted showed that national and international unions with headquarters in the United States recorded a decline of 400,000 in membership between 1956 and 1958, reversing an upward trend that had existed for the past two decades."

In order to encourage and foster the process of collective bargaining, it is essential that the law protect the right of unions to negotiate collective bargaining agreements before achieving majority status. We believe the provisions of the National Labor Relations Act were intended to and do protect that right.

---

[7] U.S. Department of Labor, B.L.S. Bull. No. 1267, December 1959, pp. 1, 7-9, 15.

III

THE UNFAIR LABOR PRACTICES, IF ANY THERE WERE, INVOLVED IN THE MAKING OF THE STRIKE SETTLEMENT OF AUGUST 30, 1957, COULD NOT INVALIDATE THE SUBSEQUENT FULL COLLECTIVE BARGAINING AGREEMENT OF OCTOBER 10, 1957 OR REQUIRE WITHHOLDING OF RECOGNITION FROM THE UNION UNTIL CERTIFIED

Admittedly the Union had been designated as their bargaining representative by more than a majority of the employees in the appropriate unit on October 10, 1957, when the first complete collective bargaining contract was signed (R. 23-24, 133, n. 3).[68] Both the majority of the Board and the majority of the court below held that this contract, as well as the August 30, 1957 strike settlement memorandum, must be set aside. The Board did not in its decision explain the theory on which it set aside the October 10, 1957 contract. The majority of the court below held that so long as a contract executed when there was no majority was in effect, the union could not obtain a lawful majority. The court below in this respect stated (R. 133, n. 3):

> "* * * The fact that, by October, the union may have achieved a majority status during the period that it maintained an unlawful agreement is irrelevant. *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, [illegible], *reversing on other grounds* 105 App. D.C. 102, 107, 264 F. 2d 575, 580 (1959). See *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 703-705 (1944) and *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 372, 185 F. 2d 732, 744 (1950), cert. den., 341 U.S. 914 (1951)."

The reliance for this doctrine upon this Court's decision in *Local Lodge 1424, International Association*

---

[68] There were 383 employees or less in the unit on October 10, of which the union had a clear majority of 211. See n. 2, p. 6, *supra*.

of Machinists v. *N.L.R.B.*, 362 U.S. 411, is misplaced. At page 414, this Court was merely describing a principle of the Board, which this Court specifically described as "not drawn in question here," the only issue before this Court there being a statute of limitations point, decided so as to eliminate all other issues. Moreover the unlawful agreement involved in the *Machinists* case was a union security agreement, which, of course, does necessarily coerce employees to join and remain members of the contracting union. There was no union security clause in either the August 30, 1957 strike settlement memorandum nor in the October 10, 1957 formal collective bargaining contract here.

Because of the good faith belief of both the Employer and the Union that a majority of the employees had designated the Union before August 30, 1957, there could have been no possible coercive effect on any employee as a result of the exclusive recognition or of the coverage of all employees by the contract. There was nothing in the act of signing the strike settlement or in the terms of the settlement to cause any employee to join or remain a member of the Union.

If good faith is not a defense, and if the exclusive recognition grant was technically an unfair labor practice, it was not the kind of unfair labor practice which either in law or in fact had any effect on the Union's subsequent majority on October 10, 1957.

The policy in favor of collective bargaining contracts requires that otherwise valid contracts should be set aside only for the most compelling reasons. This Court has held that otherwise valid collective bargaining contracts should not be set aside merely because the contracting union received the employer's favor through acts of interference, restraint and coer-

cion, including the discriminatory discharge of six adherents of a rival union. In refusing to set aside the contracts in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236-238, this Court said:

"'* * * Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective

* * *

"'* * * Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree.

* * *

"The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See *Jones* v. *Securities & Exchange Comm'n*, 298 U.S. 1, 15. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

"Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were 'simply a device to consummate and perpetuate' the companies' illegal conduct and constituted its culmination. But, as we have said, this conclusion is entirely too broad to be sus-

tained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge in extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice.

"We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

Here, as in the *Consolidated Edison* case, there was no proof as to how many, if any, of the employees who were members on October 10, 1957, were so as a result of the exclusive recognition given the Union on August 30, 1957. Even if they did join because of the exclusive representation, such motivation was not unlawfully coerced so as to deprive their act of joining

of validity. Here there is far less reason than in the *Consolidated Edison* case to set aside the contracts.

Moreover, if the exclusive recognition clause in the October 10, 1957 agreement was invalid, it was a separable provision. Article XXIX, Section 2, of the contract of October 10, 1957 provides for separability as follows (R. 111):

> "If any provision of this agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this agreement, or the application of such provisions to other persons or circumstances shall not be affected thereby."

In *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 79, this Court referred to the common law doctrine of separability as well as to the public policy in preserving employee relationships on the basis worked out by an employer and his employees, as reasons for not holding a whole contract invalid because it contained an illegal union security provision. This Court said:

> "The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to the common-law contract doctrine. * * * We see no sound public policy served by it. Realistically, if the formal contract be stricken, the enterprise must go on—labor continues to do its work and is worthy of some hire. The relationship must be governed by some contractual terms. There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their

bargain, where the excess may be severed and separately condemned as it can here."

Another case severing the unlawful clause and upholding the balance of the collective agreement is *Plumbers Union* v. *Dillion*, 9th Cir., 1958, 255 F. 2d 820, 823.

To the same effect see *N.L.R.B.* v. *Gaynor News Co.*, 2d Cir., 1952, 197 F. 2d 719, 724, affirmed without consideration of this issue, 347 U.S. 17, 37, n. 35, where the court said:

> "The Board argues that the entire contract must be voided and collective bargaining relations suspended, or otherwise the union will 'be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract.' * * * we believe the remedy works out too harshly here. * * * We do not, however, think that the possible danger to employees of allowing some collective bargaining relations with this union outweighs the substantial harm to them in taking away for an indefinite period all collective bargaining rights. We have therefore decided to refuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification."

Similarly in *Puerto Rico S.S. Ass'n.* v. *N.L.R.B.*, D.C. Cir., 1960, 281 F. 2d 615, 618, the court refused to set aside an entire contract solely because of an illegal preferential hiring clause. The court stated:

> "Having in mind the nature of the violation, and in the absence of any proof of conduct under the clause in question, we see no rational basis for

the remedy ordered by the board. Nor do we see how it could effectuate the policies and purpose of the Act to destroy a contractual relationship which has resulted in labor peace of a number of years.' There is no competing union in the picture; there are no inequities shown; and enforcement of the order would result in there being a considerable period of time while an election is being arranged and held, during which period the employees would be working without a contract and would have no bargaining representative to handle such matters as grievances. We believe that enforcement of this portion of the order would not aid in the maintenance and promotion of industrial peace and would not aid in the 'healthy policy of promoting production and employment.'"

In the instant case the Board order is so broad as to bar the Employer from dealing with the Union even as the representative of its own members in such matters as grievances pending the establishment of its majority in an election (R. 16-18). If any order at all is indicated, certainly by acceptable standards the order here is much broader than can be justified. As indicated by the above court cases modifying Board orders which upset collective bargaining contracts because of unfair labor practices not of such a character as to vitiate the whole contract, the imposition of such orders by the Board is not limited to this case and should be corrected by this Court. These orders indicate the same narrow restrictive approach to collective bargaining as is apparent in the finding that the Employer and the Union committed unfair labor practices by making an arithmetical error when they agreed to cease their former hostility and to sign a collective bargaining agreement.

All considerations of sound labor policy require that the Union's contract of October 10, 1957 be held valid and that the Union be permitted to continue to act as the exclusive bargaining representative. If any change is to be authorized in its representative status, there certainly is no reason to deprive it of full power to bargain collectively on behalf of and represent its members.

There is one final point requiring emphasis. By its decision in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448, 456, this Court has established that the whole law of collective bargaining in its substantive aspects is based on "federal law which the courts must fashion from the policy of our national labor laws." This Court likewise (at p. 457) pointed to the National Labor Relations Act as one of the national labor laws which "expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations."

It follows that what the Board and the courts do with the instant case will establish law applicable to the validity and enforceability of collective bargaining contracts in arbitration proceedings, state courts or proceedings under Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185. In short the ramifications of the ruling in this case can be far reaching. To hold the instant contract unlawful and unenforceable as the National Labor Relations Board has done is to imperil the many thousands of contracts throughout the country where the parties in good faith, but without conclusive determination of the difficult issue of majority, have entered into genuine arm's length collective bargaining and have arrived at a mutually acceptable working arrangement to govern wages, hours and employment relationships.

CONCLUSION

For the foregoing reasons it is respectfully urged that the decision below be reversed with directions to enter a decree setting aside the Board's order.

MORRIS P. GLUSHIEN
1710 Broadway
New York 19, New York

CHARLES J. MORRIS
1601 National Bankers
Life Building
Dallas 1, Texas

L. N. D. WELLS, JR.
1601 National Bankers
Life Building
Dallas 1, Texas

RUTH WEYAND
1346 Connecticut Ave., N.W.
Washington 6, D. C.

Counsel for Petitioner

February 10, 1961

APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*), as of 1957, at the time the unfair practices found allegedly were committed, are as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing dimunition of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impair-

ment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * * * * * * * *

"(3) The term 'employee' shall include any employee and shall not be limited to the employees of a

particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment • • •

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or con-

tribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of the Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made * * *; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to

tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * * * * * * * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certi-

fied as the representative of such employees under the provisions of section 9; * * * *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves written notice upon the other party to the contract of the proposed termination or modifica-

tion sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute * * *

"(4) continues in full force and effect, without resorting to strike or lock-out, all terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is party to the contract, has been superseded or ceased to be the representative of the employees subject to the provisions of section 9 * * *"

* * * * * * * * * * *

"REPRESENTATIVES AND ELECTIONS

"SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time

to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representatives as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by the employer as the bargaining representative is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a):

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall

the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * * * * * * * *

"(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * *

* * * * * * * * * *

"(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evi-

dence on the record considered as a whole shall be conclusive. * * *

* * * * * * * * * *

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

FILE COPY

Office Supreme Court, U.S.
FILED
MAR 22 1961
JAMES R. BROWNING, Clerk

No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
FREDERICK U. REEL,
HERMAN M. LEVY,
Attorneys,
National Labor Relations Board,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	5
C. The decision of the court of appeals	6
Summary of argument	6
Argument	10
Introduction	10
I. The grant of exclusive recognition to a minority union violates Section 8(a) (1) and (2) of the Act	12
II. A good faith but erroneous belief that the union had a majority is no defense to the charge of unlawful support	25
III. The Board properly ordered the Company to stop recognizing the Union and giving effect to its contract pending the Union's establishing its majority in a Board election	31
IV. The Board properly found that the Union by obtaining exclusive recognition while representing only a minority of the employees violated Section 8(b)(1)(A) of the Act	34
Conclusion	39

CITATIONS

Cases:	
A.F. of L. v. *National Labor Relations Board*, 308 U.S. 401	30
Allis-Chalmers Mfg. Co. v. *National Labor Relations Board*, 162 F. 2d 435	26
Art Metals Constr. Co. v. *National Labor Relations Board*, 110 F. 2d 148	35
Brooks v. *National Labor Relations Board*, 348 U.S. 96	10, 27

Cases—Continued

	Page
Coast Pacific Lumber Co., 78 NLRB 1245	15
Communications Workers v. *National Labor Relations Board*, 215 F. 2d 835	38
Consolidated Builders, Inc., 99 NLRB 972	15
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U.S. 197	33
Daniel Hamm Drayage Co., 84 NLRB 458, enforced, 185 F. 2d 1020	15
District 50, United Mine Workers v. *National Labor Relations Board*, 234 F. 2d 565	17
Dixie Bedding Mfg. Co. v. *National Labor Relations Board*, 268 F. 2d 901	16
Drivers, Chauffeurs and Helpers Local 639, 119 NLRB 232	19
Elastic Stop Nut Corp. v. *National Labor Relations Board*, 142 F. 2d 371	18
Franks Bros. Co. v. *National Labor Relations Board*, 321 U.S. 702	32
Glendale Mfg. Co. v. *Local No. 520, ILGWU*, 283 F. 2d 936	16
Guy F. Atkinson Co., 90 NLRB 143, enforcement denied, 195 F. 2d 141	15
Hillsdale Steel Products Co., 30 NLRB 623	14
Hoover Co. v. *National Labor Relations Board*, 191 F. 2d 380	15
I.A. of M. v. *National Labor Relations Board*, 311 U.S. 72	13
Inland Steel Company v. *National Labor Relations Board*, 170 F. 2d 247, certiorari denied, 336 U.S. 960	28
J. I. Case Co. v. *National Labor Relations Board*, 321 U.S. 332	10
John B. Shriver Co., 103 NLRB 23	16
Lane v. *National Labor Relations Board*, 186 F. 2d 671	38
Local Lodge No. 1424 v. *National Labor Relations Board*, 362 U.S. 411	7, 19
Lukas-Harold Corp., 44 NLRB 730	15
McQuay-Norris Mfg. Co. v. *National Labor Relations Board*, 116 F. 2d 748	26
Miami Copper Co., 92 NLRB 322	37
Mrs. Tucker's Products, 106 NLRB 533	15

Cases—Continued

	Page
National Labor Relations Board v. *Brashear Freight Lines*, 119 F. 2d 379	15
National Labor Relations Board v. *Corning Glass Works*, 204 F. 2d 422	18
National Labor Relations Board v. *District 50, United Mine Workers*, 355 U.S. 453	9, 17, 31, 32
National Labor Relations Board v. *Drivers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274	7, 9, 11, 18, 24, 25, 35, 36, 37, 38
National Labor Relations Board v. *Electronics Equipment Co.*, 194 F. 2d 650	15, 16
National Labor Relations Board v. *Gaynor News Co.*, 197 F. 2d 719, affirmed, 347 U.S. 17	33, 34
National Labor Relations Board v. *Gluek Brewing Co.*, 144 F. 2d 847	26
National Labor Relations Board v. *Guy F. Atkinson Co.*, 195 F. 2d 141	20
National Labor Relations Board v. *Illinois Tool Works*, 153 F. 2d 811	26
National Labor Relations Board v. *Industrial Cotton Mills*, 208 F. 2d 87, certiorari denied, 347 U.S. 935	26–27
National Labor Relations Board v. *Local 404, Teamsters*, 205 F. 2d 99	38
National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333	31
National Labor Relations Board v. *Masters-Lake Success, Inc.*, 47 LRRM 2607	17
National Labor Relations Board v. *National Container Corp.*, 211 F. 2d 525	17
National Labor Relations Board v. *Newark Morning Ledger Co.*, 120 F. 2d 262	35
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U.S. 261	7, 8, 13, 29
National Labor Relations Board v. *Perfect Circle Co.*, 162 F. 2d 566	26
National Labor Relations Board v. *Philadelphia Iron Works*, 211 F. 2d 937	38
National Labor Relations Board v. *Star Publishing Co.*, 97 F. 2d 465	26
National Labor Relations Board v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342	28

Cases—Continued

	Page
National Licorice Co. v. *National Labor Relations Board*, 309 U.S. 350	33
National Motor Bearing Co., 5 NLRB 409, enforced, 105 F. 2d 652	16
Norris v. *National Labor Relations Board*, 177 F. 2d 26	30
Pennsylvania Greyhound Co., 3 NLRB 622	14
Pressed Steel Car Co., 7 NLRB 1099	14
Safeway Stores, Inc., 111 NLRB 968	16
Solventol Chemical Products, 113 NLRB 617	15
Stein and Calder, 46 NLRB 129	16
Sunbeam Corp., 99 NLRB 546	16
United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62	30
Vegelahn v. *Guntner*, 167 Mass. 92, 44 N.E. 1077	14
Westinghouse Electric Corp., 85 NLRB 1519	15

Statutes:

National Labor Relations Act, as amended, 1947 (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 7	5, 13, 14, 15, 35, 38
Section 8(a)(1)	2, 5, 10, 11, 12, 13, 15, 25, 31, 34, 35, 37
Section 8(a)(2)	2, 5, 7, 11, 12, 13, 25, 26, 30, 31, 34, 35
Section 8(a)(3)	12
Section 8(a)(5)	13, 28, 29
Section 8(b)(1)(A)	3, 5, 9, 10, 11, 18, 24, 34, 35, 36, 37, 38, 39
Section 8(b)(4)(C)	37
Section 8(d)	28
Section 9(a)	10, 13
Section 9(c)	28, 29
Section 10(c)	12
Section 13	37
National Labor Relations Act, as amended, 1959 (73 Stat. 519, 29 U.S.C. 158, Supp. I):	
Section 8(b)(7)	24
Section 8(f)	21, 22

Miscellaneous:

93 Cong. Rec. 4432, 4435, 4436, II Leg. Hist. (1947) 1199, 1204, 1207	35
93 Cong. Rec. 4499	20
105 Cong. Rec. 7033, 10104, II Leg. Hist. (1959), 1273, 1289	23
105 Cong. Rec. 15541, II Leg. Hist. (1959) 1577, 1578	22

Miscellaneous—Continued

	Page
105 Cong. Rec. A 8360 (daily ed., September 24, 1959), II Leg. Hist. (1959) 1830	23
Cox, *Law and the National Labor Policy*, pp. 10–15, 23–31	37
Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare on S. 1973, 82d Cong., 1st Sess., pp. 31, 63	21
H. Rept. No. 245, 80th Cong. 1st Sess., p. 42, I Leg. Hist. (1947) 333	12
National Labor Relations Board, Ninth Annual Report (G.P.O. 1944), pp. 4–5	20
S. Rep. No. 105, 80th Cong., 1st Sess., pp. 12–13, I Leg. Hist. (1947), 418–419	12
S. Rep. No. 105, 80th Cong., 1st Sess., p. 50 (Supp. Views), I Leg. Hist. (1947) 456	35
S. Rep. No. 1211, 83d Cong., 2d Sess	21
S. Rep. No. 1684, 85th Cong., 2d Sess	21
S. Rep. No. 187, 86th Cong., 1st Sess., p. 74, I Leg. Hist. (1959) 470	24

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 129–139) is reported at 280 F. 2d 616. The Decision and Order of the National Labor Relations Board (R. 2–19) are reported at 122 NLRB 1289.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1960. The petition for a writ of certiorari was filed on August 1, 1960, and was granted on October 10, 1960 (R. 141), 364 U.S. 811. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer renders unlawful support to a labor organization, in violation of Section 8(a) (1) and (2) of the National Labor Relations Act, when he recognizes it as the exclusive bargaining representative of all the employees in the bargaining unit at a time when the union in fact represents only a minority of those employees.

2. Whether the Board, as a remedy for that unfair labor practice, may properly order the employer to withhold exclusive recognition from the union and to stop giving effect to a contract requiring such recognition, until the union's majority status is established in a Board conducted election.

3. Whether a union which obtains exclusive recognition as the bargaining representative while representing only a minority of the employees thereby restrains the employees in the exercise of their right to select a bargaining representative or to refrain from so doing, in violation of Section 8(b)(1)(A) of the Act.

STATUTE INVOLVED

The pertinent statutory provisions appear in the Appendix to petitioner's brief.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Board found that the Company[1] violated Section 8(a) (1) and (2) of the Act by recognizing, and

[1] Bernhard-Altmann Texas Corporation is a Delaware corporation with its principal place of business in San Antonio, Texas, where it is engaged in the manufacture of knitwear for interstate commerce (R. 21).

executing and maintaining a contract with, the International Ladies' Garment Workers' Union as the exclusive bargaining representative of its employees, at a time when the Union did not in fact represent a majority of those employees. The Board also found that the Union violated Section 8(b)(1)(A) by executing and maintaining the same contract. The facts upon which these findings rest may be summarized as follows:

In October, 1956, the Union began to organize the Company's employees (R. 2, 22, 123–128). Between October, 1956, and September, 1957, the Union continued its organizational efforts, securing from employees authorization cards which designated the Union as the employees' bargaining representative (R. 22, 123–128). As of August 30, 1957, the critical date in this proceeding, the Union had not received authorization cards from a majority of the employees (R. 4–5).[2]

On July 29, 1957, in an action unrelated to the Union's organizational campaign, certain employees

[2] The record shows that, as of August 30, 1957, 280 employees were within the bargaining unit covered by the contract which the parties entered into (R. 46–47, 60, 82, 91–92, 112). In addition, the unit may have included some or all of another 120 employees laid off in the preceding month (R. 117, 41–43, 62). The Union had received authorizations from 158 employees, including 88 of the laid-off employees (R. 117, 123). If those 88 are excluded, the Union represented only 70 out of a unit of 280; if they are all included, the Union represented only 158 out of 368 or more. On these facts, the Board found, and the court below agreed (R. 4–5, 132–133), that the Union did not represent a majority of the employees on August 30, 1957. The petitioner in its brief does not challenge this finding (Br. 2, 53).

587907—61——2

struck in protest against a wage reduction in the Topping Department (R. 2, 22, 82). The Union, which represented many of the strikers, attempted to compose the differences. On August 30, 1957, following several meetings devoted to negotiation, the Union and Company signed a "memorandum of understanding" whereby the Company recognized the Union as exclusive bargaining agent for its production and shipping employees (R. 2–3, 22–23, 94–95). This memorandum provided, among other things, for an immediate termination of the strike, a wage increase, the checkoff of union dues, arbitration of disputes and the drafting of a formal contract containing the terms agreed upon (R. 3, 22–23, 94–95). Prior to the signing of the memorandum, the Company did not request an opportunity to examine the signed authorization cards, nor did the Union volunteer these cards (R. 3, 46, 120–122), which would have shown that the Union did not represent a majority of the employees (R. 4–5). Furthermore, at the time of the signing of the August 30 memorandum, the Company did not make the payroll records available, nor did it check the authorization cards against the payroll records subsequent to August 30 (R. 121).

On October 10, 1957, the Company and Union which had then acquired a "majority" (see *infra*, p. 32), signed a formal collective bargaining agreement which incorporated the terms of the "memorandum of understanding" (R. 3, 96, 60–61). This agreement reaffirmed recognition of the Union as sole bargaining agent for the Company's non-super-

visory production and shipping workers with certain specific exclusions (R. 3, 97).[3]

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company, by recognizing the Union as the exclusive bargaining representative of the employees at a time when the Union lacked majority status, extended unlawful support to the Union in violation of Section 8(a)(2) of the Act, and interfered with, restrained and coerced the employees in the exercise of their rights under Section 7 to choose, or to refrain from choosing, a bargaining representative, in violation of Section 8(a)(1) of the Act (R. 8). The Board, one member dissenting, further concluded that the Union, by acquiring the status of exclusive bargaining representative at such a time, likewise restrained and coerced the employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act (R. 8, 13-16).

The Board ordered the Company to cease and desist from supporting the Union and recognizing it as the exclusive bargaining representative of the employees in the specified unit, and to withhold such recognition until the Union demonstrated its majority status in a Board-conducted election. The

[3] The unit description conforms to the unit in the "memorandum of understanding" except that it was more specific in designating excluded employees. Excluded in the October 10 agreement were mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truckdrivers, engineers, maintenance men, and janitors (R. 97).

Union likewise was ordered to cease and desist from acting as exclusive representative until its majority was shown by the election. The Board's order (R. 9–12) further directed the Company and the Union to cease and desist from giving effect to the "memorandum of understanding" or the contract of October 10, 1957, which had recognized the Union as the exclusive bargaining representative of the employees in the specified unit.[4] Finally, the order directed both parties to post notices.

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, speaking through Mr. Justice Burton (with Judge Fahy dissenting), affirmed the Board's finding and conclusions, and enforced its order (R. 129–139).

SUMMARY OF ARGUMENT

The national labor policy rests on the principles of freedom of choice and majority rule. Just as an employer may not defeat that policy by withholding exclusive bargaining status from a union which represents a majority, so may he not defeat that policy by extending exclusive bargaining status to a union which does not represent a majority. The latter action violates the basic principles as much as the former, for in both cases, the will of the majority of the employees (to unionize in one case, and not to unionize in the other) is frustrated by the employer's action. This occurred here when the Company rec-

[4] The Board's order, however, did not require the Company to vary or abandon any term or condition of employment established in the performance of the agreement (R. 9–10).

ognized the Union as exclusive bargaining representative at a time when the Union did not represent a majority.

I

That a grant of exclusive recognition to a minority union constitutes unlawful support of that union in violation of Section 8(a)(2) has been settled law since the early days of the Wagner Act. This Court early recognized that a grant of exclusive recognition gives a union "a marked advantage over any other in securing the adherence of employees." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 267. As recently as last Term this Court in two cases assumed, at least for purposes of the decisions therein, that the granting of exclusive bargaining status to a minority union was an unfair labor practice. *National Labor Relations Board* v. *Drivers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, 280; *Local Lodge No. 1424* v. *National Labor Relations Board,* 362 U.S. 411, 413–414, n. 3, 429, 433. The courts of appeals have likewise viewed the law as "well-settled." Congress recognized this general rule in 1959, when it created a special exception for the construction industry.

II

The employer's belief that the union represented a majority is not relevant in determining whether he violated the Act in granting exclusive bargaining status to a union which in fact represented only a minority. The right of a majority not to be represented by a union it did not select is infringed to the

same extent whether the employer erroneously believes in the majority status or not. It should be noted, moreover, that the employer here did not even make a reasonable effort to find out whether the union in fact had a majority, which it could easily have done. The situation is not analogous to a refusal to bargain based on a mistaken belief that a union lacked a majority. In such a case the union can secure a prompt election to resolve the question of majority status. Here, however, the employer by granting exclusive bargaining status to a minority union has prevented the holding of a free election because he has already given that union "a marked advantage." *Pennsylvania Greyhound, supra.* The employer who erroneously but in good faith believes in a union's majority status is in substantially the same position under the law as an employer who erroneously but in good faith challenges a Board determination of the appropriate bargaining unit. In both cases the validity of the employer's belief, not his good faith, is tested before the Board and the courts; and, if he has erred, appropriate remedial relief (to extend exclusive recognition in the one case or to stop extending exclusive recognition in the other) is prescribed, but no other penalty attaches. When orderly Board and court processes establish that a union did not command the majority support necessary to exclusive bargaining status, a good faith belief in a contrary fact cannot justify permitting the mistakenly acquired status to continue.

III

The remedy provided by the Board corrects the situation by returning the parties to the status they occupied before the Union was unlawfully granted exclusive recognition. The employer is directed to withhold exclusive recognition unless and until the Union demonstrates its majority in a free election, conducted after the effects of the unfair labor practice have been dissipated. This remedy, conventional in cases of this nature, was approved as recently as *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453.

IV

The employer's unlawful conduct in imposing a bargaining representative on a majority of the employees has as its counterpart the Union's unlawful conduct in acting as exclusive bargaining representative when not authorized to do so. The Union, like the employer, has thus unlawfully intruded on employee rights. This Court's decision in *Drivers, Local Union No. 639* (*Curtis Bros.*), *supra*, did not, we believe, limit union liability under the Act to acts of restraint and coercion accomplished by physical violence.

The holding that Section 8(b)(1)(A) did not make it unlawful for a minority union to picket in order to obtain exclusive recognition is explained by the fact that to prohibit such activity under the general language of Section 8(b)(1)(A) would have introduced a purely formal and untenable distinction between organizational and recognitional strikes and picketing, or else have prohibited all such organiza-

tional activity by a minority union even though the employer was not subjected to a demand that he recognize the union in violation of Section 8(a)(1). In the present case the Union, by joining in the execution of the collective agreement, went beyond such organizational tactics to participate in the coercion and restraint of the employees' rights, aiding the employer to violate Section 8(a)(1) and itself violating Section 8(b)(1)(A).

ARGUMENT

INTRODUCTION

Collective bargaining, the cornerstone of our national labor policy, is founded on the principles of freedom of choice and majority rule. Section 9(a) of the original Wagner Act, which was unchanged in this respect by the Taft-Hartley Act, provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees * * * shall be the exclusive [bargaining] representatives of all the employees * * *." In *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 339, this Court noted that an individual is free "to vote against representation; but the majority rules * * *." Again in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 103, this Court recognized that Congress placed "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers."

In the present case the pattern was reversed. Notwithstanding Section 9, the Company granted exclusive bargaining status to a representative designated

or selected by only a minority of the employees.[5] The minority—not the majority—ruled. A non-consenting majority was placed under the bargaining responsibility of an agency selected by a minority. What occurred here, in short, was not effectuation, but frustration, of the underlying national policy—the imposition of a collective bargaining representative upon a majority which had not selected it. The question presented by this case is whether the Board and the court below correctly held that, by imposing an exclusive bargaining representative on the majority of the employees, the Company and the Union violated the Act. In the following pages we show that the Company violated Section 8(a) (2) and (1), and the Union, Section 8(b)(1)(A);[6] that the Company's mistaken belief that the Union had a majority at the time of recognition is no defense to the violation; and that the Board's order directing the Company to stop recognizing the Union as exclusive bargaining agent and to stop giving effect to the collective bargaining agreement requiring such recognition—unless and until the Union won a

[5] As shown n. 2, *supra*, p. 3, the Union, on August 30, 1957, when exclusive recognition was first extended to it, represented only 70 employees out of a unit of 280, or, at best, 158 out of a unit of 368. Nor is it relevant that the Union may have thereafter "signed up" additional employees (Pet. Br. 6, n, 2), for any subsequent "majority" would have been tainted by the August 30 unfair labor practices (see *infra*, p. 32).

[6] As we shall show (*infra*, pp. 34–39), the Section 8(b)(1)(A) finding, which is a relatively minor part of this case, is not inconsistent with *National Labor Relations Board* v. *Drivers, Local Union No. 639* (*Curtis Bros.*), 362 U.S. 274.

587907—61——3

Board election—is a reasonable exercise of the Board's remedial power.[7]

I. THE GRANT OF EXCLUSIVE RECOGNITION TO A MINORITY UNION VIOLATES SECTION 8(a) (1) AND (2) OF THE ACT

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "contribute * * * support" to a labor organization.[8] From the earliest days of the Wagner Act the courts have recognized that "once an employer has conferred recognition

[7] We emphasize that the violation here is the grant of *exclusive representative* status to a minority union. This case does not involve bargaining with a minority union *for its members only*, but bargaining with a minority as the exclusive representative of all the employees. Thus, both the August 30 memorandum of understanding and the subsequent formal contract recognized the Union "as the exclusive bargaining agent" for all of the employees in the unit involved (R. 94, 96–97). The discussion at pp. 60–108 of petitioner's brief, which attempts to distinguish "collective bargaining" from "exclusive recognition," therefore has no relevance to this case.

Similarly, there is no basis here for the suggestion that, but for the recognition of the Union, the strike would have proceeded indefinitely (Pet. Br. 33). The strike was not a strike for recognition (*supra*, pp. 3–4), and hence could have been settled without necessarily according exclusive representation rights to the Union. In any event, it may be noted that an unlawful agreement does not become valid because it ends a strike. An agreement to discharge non-members of a union might also end a strike, but would nonetheless violate Section 8(a) (3) and (1).

[8] This section prohibits support to any labor organization "irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Section 10(c) of the Act as amended in 1957. H. Rep. No. 245, 80th Cong., 1st Sess., p. 42; S. Rep. No. 105, 80th Cong., 1st Sess., pp. 12–13, set forth in I Leg. Hist. of the Labor Management Relations Act (G.P.O. 1948) 333, 418–419.

on a particular organization it has a marked advantage over any other in securing the adherence of employees" (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 267), for even "[s]light suggestions as to the employer's choice * * * may have telling effect among [employees]" (*I.A. of M.* v. *National Labor Relations Board,* 311 U.S. 72, 78). When an employer confers such exclusive recognition on a majority union he is not contributing unlawful support, for he is under a legal duty to recognize it.[9] But when, as here, he confers exclusive recognition on a union which does not represent a majority, the "marked advantage * * * in securing the adherence of employees" thus afforded the union falls within the interdiction of Section 8(a)(2) as it cannot be excused by a showing of a legal duty to recognize. Similarly, the grant of exclusive recognition in these circumstances would constitute an abridgment of the employees' Section 7 right "to bargain collectively through representatives of their own choosing" or "to refrain from" such activity, and hence violate Section 8(a)(1) which bars an employer from interfering with or restraining the exercise of Section 7 rights.

The proposition that an employer violates Section 8(a) (1) and (2) by granting exclusive recognition to a union which represents only a minority of the employees—which is the heart of this case—is deeply embedded in both the original philosophy and subsequent interpretation and administration of the Na-

[9] See Sections 8(a)(5) and 9(a).

tional Labor Relations Act. Under the Holmesian philosophy of free competition [10] it made little difference whether unorganized employees joined a union because they wished, because the employer forced them, or because the power of the union to deprive them of jobs left no viable alternative; the injuries were justified by the pursuit of self-interest. Prior to 1935 many unions followed the practice of "organizing employers" by securing recognition as the exclusive bargaining representative of all the employees regardless of the employees' wishes. But "top-down" organizing is plainly incompatible with the NLRA philosophy that the law should protect employees against interference by employers in union organization and the choice of representatives. "Top-down" organizing is equally inconsistent with the NLRA principle of majority rule. Consequently, although there were few direct challenges, the Board and the courts of appeals have from the beginning assumed that an employer's recognition of a minority union as the representative of all the employees violates rights guaranteed by Section 7.

Thus, in representation proceedings the Board has long taken the view that only a union chosen by a free majority of the employees in the bargaining unit may lawfully act for the entire unit. A contract signed with a minority union for its members only is not a bar to an election.[11] An election will

[10] *Vegelahn* v. *Gunter*, 167 Mass. 92, 106–107, 55 N.E. 1077, 1081 (dissenting opinion).

[11] *Pennsylvania Greyhound Co.*, 3 NLRB 622, 646; *Pressed Steel Car Co.*, 7 NLRB 1099, 1101, 1102; *Hillsdale Steel Products*

not be held where the number of employees in the unit is expanding, because the initial work force cannot truly represent all the employees and its choice of a representative will not therefore signify the wishes of a majority.[12] And signing a contract with a union designated by a majority of an initial work force too small to be representative is an unfair labor practice.[13]

The same principle underlies the interpretation of the phrase "concerted activities" in Section 7. Strikes and picketing designed to compel recognition of a minority union have been held not to be protected by Section 7 because their objective is to compel the employer to interfere with employees' rights by conduct violating Section 8(a)(1).[14]

Whenever the issue has been raised directly the Board has uniformly held that it is an unfair labor practice for an employer to recognize a minority union as the exclusive representative of all the employees

---

Co., 30 NLRB 623, 625; *Solventol Chemical Products*, 113 NLRB 617, 618.

[12] *Lukas-Harold Corp.*, 44 NLRB 730, 732–733; *Coast Pacific Lumber Co.*, 78 NLRB 1245, 1246; *Westinghouse Electric Corp.*, 85 NLRB 1519, 1521; *Mrs. Tucker's Products*, 106 NLRB 533, 535.

[13] *Daniel Hamm Drayage Co.*, 84 NLRB 458, 460, enforced, 185 F. 2d 1020 (C.A. 5); *Guy F. Atkinson Co.*, 90 NLRB 143, enforcement denied on other grounds, 195 F. 2d 141 (C.A. 9). Cf. *Consolidated Builders, Inc.*, 99 NLRB 972, 975.

[14] *National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. 2d 379, 382 (C.A. 8); *Hoover Co.* v. *National Labor Relations Board*, 191 F. 2d 380, 386–388 (C.A. 6); *National Labor Relations Board* v. *Electronics Equipment Co.*, 194 F. 2d 650, 652–654 (C.A. 2).

in a bargaining unit.[15] The courts of appeals have adopted a similar view.

In *Dixie Bedding Mfg. Co.* v. *National Labor Relations Board*, 268 F. 2d 901, 905 (C.A. 5), the court stated: "No question is raised as to legal principles involved, it being well settled that the grant of exclusive recognition to a union which lacks majority representation is unlawful." In *Glendale Mfg. Co.* v. *Local No. 520, ILGWU*, 283 F. 2d 936, 938, 940 (C.A. 4), petition for certiorari pending, No. 708, this Term, the court observed: "There are many cases which hold that employers committed unfair labor practices when they entered into agreements, affecting the employees generally, with a favored or minority union [footnote citing cases] * * * We conclude that this uncertified, minority union has no right to represent the employees and the employer no right to deal with it as the representative of the employees. Should they deal with each other on any such basis, they would invade the statutory right of the employees." And, in *National Labor Relations Board* v. *Electronics Equipment Co.*, 194 F. 2d 650 (C.A. 2), the court remanded the case to the Board to determine whether the employees sought exclusive recognition or members only recognition, for, in the court's view, the former would have rendered the activity unprotected as the union was only a minority group. It stated (194 F. 2d at 652–654):

---

[15] *National Motor Bearing Co.*, 5 NLRB 409, 431–432, enforced on this point, 105 F. 2d 652 (C.A. 9); *Stein and Calder*, 46 NLRB 129, 130–131, 135; *Sunbeam Corp.*, 99 NLRB 546; *John B. Shriver Co.*, 103 NLRB 23, 38; *Safeway Stores, Inc.*, 111 NLRB 968, 974.

> * * * The employer argues (and the trial examiner held) that the sending of the letters was not a protected activity, because the letters had an unlawful purpose, i.e., to coerce the employer into recognizing Local 65 at a time when to do so would have been an unfair labor practice by the employer.
>
> * * * * *
>
> * * * it is very far from clear, on the evidence now before us, that the workers, by a strike or otherwise, would have pursued the aim of an exclusive bargaining contract if they had attained reinstatement. * * * As the Board noted, it is not certain that the letters demanded an exclusive bargaining contract for Local 65 at all. The writers might have had in mind something like a members-only contract to insure satisfactory reinstatement and working conditions for themselves alone * * *
>
> * * * * *
>
> * * * Consequently before calling the sending of the letters unprotected, because conducted for an illegal purpose, we will remand the case to the Board for the taking of additional evidence and the making of a finding of fact on the question of whether, in the context in which they were written, the letters showed that the employees intended in fact to pursue the aim of an exclusive-bargaining contract.

See also *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2); *National Labor Relations Board* v. *Masters-Lake Success, Inc.*, 47 LRRM 2607, 2608 (C.A. 2), February 15, 1961; *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F. 2d 565, 569 (C.A. 4); *Elastic*

Stop Nut Corp. v. *National Labor Relations Board*, 142 F. 2d 371, 379 (C.A. 8). Some of these cases, to be sure, involved two unions competing for recognition, but the Act draws no distinction between the employer's duty to desist from supporting a union "when his employees are considering whether to unionize or not and when they are deciding to join one union or another." *National Labor Relations Board* v. *Corning Glass Works*, 204 F. 2d 422, 428 (C.A. 1). Granting exclusive recognition to a minority union is unlawful support whether its opponent is a competing union, or "no union."

This Court has recently accepted the underlying principle, at least *arguendo*, for the purposes of two decisions. In *National Labor Relations Board* v. *Drivers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, the Court, although rejecting the Board's ultimate conclusion that picketing by a minority union to obtain exclusive recognition was within the scope of Section 8(b)(1)(A) (discussed more fully, *infra*, pp. 34–39, did not question the Board's underlying premise that the object sought by the picketing was an illegal one. Indeed, the Court, after quoting the Board as stating "the object of the Union's picketing in this case was to force the Company to commit an act prohibited by the statute itself," added the following explanation: "* * * that is, to recognize and contract with the Local although it was not the chosen representative of a majority of the Curtis Bros. employees" (*id.*, at 280). Moreover, it is noteworthy that Board Member Murdock whose dissenting view was sustained by the Court in *Curtis*, had acknowledged that, though the picketing itself was not unlaw-

ful, the *attainment* of the object sought thereby would be illegal (119 NLRB 232, 265):

> Only if at the moment of recognition a union has not yet succeeded in persuading a majority of employees to join it, is the employer's recognition of the union a violation of Section 8(a) (2) of the Act. And if this should occur the employees do not stand helplessly bound by a union not of their own choosing, but may file charges and obtain relief from the Board. From time to time the Board has cases where an employer has recognized a minority union and the Board has set aside contracts and enjoined the employer from recognizing it until certified. * * *

Similarly in *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, where the Court held that the limitations period imposed by Section 10(b) barred the Board from reaching a contract granting exclusive recognition and a union-security clause to a minority union, both the majority and the dissenting opinions noted that the grant of exclusive recognition to a minority union had often been held to be an unfair labor practice (at pp. 413–414, n. 3, 429, 433).

Congress, too, has consistently acted upon the same underlying assumption. As this Court noted in *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, 426, n. 16, "the issue of representation by minority unions was in the forefront of legislative concern," with respect to riders which Congress attached to the Board's appropriations in the years 1944 through 1948. The early riders precluded the Board from invalidating contracts in existence for

longer than three months regardless of whether or not the agreement was illegal because it was made with a company-dominated union, *a minority union,* or for any other reason. The riders were prompted by the *Kaiser Shipbuilding* cases, where the Board was proceeding to invalidate closed shop contracts which were entered into before a full work force had been hired and the union had secured a majority (cf. *National Labor Relations Board* v. *Guy F. Atkinson Co.,* 195 F. 2d 141, 144 (C.A. 9)). Congress, believing that the wholesale invalidation of such contracts would jeopardize war production, enacted the three-months time bar in order to "save" them from prosecution. See National Labor Relations Board, Ninth Annual Report (G.P.O. 1944), pp. 4–5. Had Congress not believed that the grant of exclusive recognition to a minority union violated the Act, obviously such special legislation would not have been required to sustain that action. Indeed, in the 1948 rider, Congress expressly limited its application to a majority union, "to get away from the so-called 'sweetheart' contract, which might be signed before the employees were actually organized" and to "give the protection of having the legal processes followed out." 93 Cong. Rec. 4499.

Similarly, after the enactment of the Taft-Hartley amendments, Congress, in 1951, gave consideration to proposals to permit unions and employers in the building and construction industry to enter into contracts recognizing the union as the exclusive bargaining agent before any employees had been hired on a particular job. It was pointed out that, because of

the special problems of the building and construction industry (discussed *infra*, p. 22), an exception to the Act's general prohibition against granting exclusive recognition to a union before it had acquired a majority was required, just as specialized treatment had been given to the *Kaiser* cases.[16]

Congress did not enact a building trades exception at that time, but it did in 1959.[17] In Section 8(f), added to the Act in the 1959 amendments, Congress provided that it should not be an unfair labor practice for an employer engaged primarily in the building and construction industry and a union to execute a bargaining agreement prior to the time the union has established its majority status.[18] This Section was en-

---

[16] See Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare on S. 1973, 82d Cong., 1st Sess., pp. 31, 63.

[17] Between 1952 and 1959, however, Congress continued to consider the problem, bills being introduced which would have permitted the building trades and certain other industries to enter into "prehire" agreements. See, *e.g.*, S. 2650, introduced by Senator Smith, S. Rep. No. 1211, 83d Cong., 2d Sess.; S. 3974, introduced by Senators Kennedy and Ives, S. Rep. No. 1684, 85th Cong., 2d Sess. After extensive consideration, neither of these measures was enacted.

[18] In relevant part Section 8(f) reads: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, * * *."

acted to provide for the special conditions of the construction industry which necessitate the negotiation of "pre-hire agreements"—collective bargaining agreements between an employer and union prior to the hiring of employees and at a time when the union has not achieved majority status. Building contractors must often estimate overall production costs in bidding for construction work, and in order to do so it is necessary to negotiate a bargaining agreement including wage rates prior to hiring of workers or actual commencement of the job. It is clear, however, that Section 8(f) was intended as an exception to the existing law.

House Speaker Rayburn, commenting on the reasons for the construction industry exception, stated (105 Cong. Rec. 15541, II Leg. Hist. (1959) 1577, 1578: [19]

> Legislation authorizing prehire agreements in the construction industry is necessary because the industry cannot conform to the present law. The NLRA was written for mines, mills, factories, and similar establishments with a stable working force * * *. The [NLRA] incorporates the principle of majority rule in choosing a representative. Therefore, no representative can be chosen and no contract can be negotiated until the employer has hired a sufficient number of employees. "NLRB 16th Annual Report," page 149; *Bernhard-Altmann Texas Corp.*, 122 NLRB No. 148 (1959).

[19] "Leg. Hist. 1959" refers to the Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959).

> Collective bargaining agreements must be negotiated in the construction industry before the employees are hired.
>
> * * * * *
>
> The result is that employers and unions in the construction industry have been in continuous violation of the NLRA ever since 1947. The legal validity of their collective bargaining agreements will remain questionable until Congress acts.

Similarly, Senator Goldwater, criticizing the proposals for a construction industry exception, stated:

> * * * The law now requires majority support for a union's becoming an exclusive bargaining representative. This provision eliminates the requirement of a showing of a majority * * *. [105 Cong. Rec. 7633, II Leg. Hist. (1959) 1273.]
>
> * * * * *
>
> * * * It permits employers and unions in that industry to sign collective bargaining agreements even though the union does not represent a majority of the employees in the unit (such agreement being presently unlawful) * * *. [105 Cong. Rec. 10104, II Leg. Hist. (1959) 1289.]

And, minority counsel to the Senate Labor Committee, in answering a question about the new law's provisions on prehire contracts, stated (105 Cong. Rec. A8360 (daily ed., September 24, 1959), II Leg. Hist. (1959) 1830):

> They gave the building trades what they have wanted for a long time and what, in fact, they are doing in violation of the law consistently all over the country.

> As I think I said earlier in this discussion, the basic principle of the law is that a union becomes the exclusive bargaining agent of employees if it represents a majority of them. That is, it's unlawful for an employer to bargain with a union if it does not represent the majority. And it is unlawful for both the employer and the union to enter into a collective-bargaining agreement, if the union doesn't represent a majority.
>
> What was done in this bill is to give the building-trades unions and their employers in the building and construction industry the right to enter into such agreement without violating the law because of the peculiar needs of the construction industry.

Congressional understanding that the Act forbids employer recognition of a minority union as exclusive representative is further evidenced by the legislative history of Section 8(b)(7), also added by the 1959 amendments. That section, as this Court observed in *Curtis,* specifically reaches the type of picketing which the Board had sought to reach under Section 8(b)(1)(A), *i.e.,* picketing by a minority union for recognition (362 U.S. 274, 277, 291). One of the basic reasons for outlawing, under certain conditions, this kind of picketing was Congress' belief that its object was illegal. Thus, such picketing was described as "permitting an employer to be coerced into violating the law by forcing him to recognize a union which the majority of his employees do not wish either to join or to select as their bargaining representative." S. Rep. No. 187, 86th Cong., 1st Sess., p. 74, I Leg. Hist. (1959) 470.

In short, Congress, no less than the Board and the courts, has long understood that the precise conduct here involved—granting exclusive recognition to a minority union—was an unlawful act. We turn next to the petitioner's contention that the illegality of the recognition here is cured because of the employer's mistaken belief that the union enjoyed majority status. In a final section discussing those portions of the order which run against the Union, we shall show that there is no inconsistency between our interpretation of Section 8(a) (1) and (2) and the decision in *National Labor Relations Board* v. *Drivers, Local Union No. 639* (*Curtis Bros.*), 362 U.S. 274.

II. A GOOD FAITH BUT ERRONEOUS BELIEF THAT THE UNION HAD A MAJORITY IS NO DEFENSE TO THE CHARGE OF UNLAWFUL SUPPORT

As the court below and the Board observed (R. 5, 132) the employer in this case made no effort to check the union's authorization cards against the payroll, and took no other steps to investigate the truth of the union's assertion of majority. The petitioner nonetheless contends (Br. 28–60) that the employer had a good faith belief in the petitioner's majority, and that this belief constitutes a defense to the violation. We submit that, under established principles, the grant of unlawful support to a minority union violates the congressional command regardless of the absence of intent to violate.

The statutory language itself does not make scienter an element of the unfair labor practice prohibited by Section 8(a)(2), and there is no valid

justification for assuming that bona fide mistakes of fact or law furnish a defense to the violation. The unlawful act is *support* of a minority union. This support, once rendered, is an accomplished fact, and results *pro tanto* in an invasion of employee rights under the Act. The quality and character of the support are neither enhanced nor diminished by the employer's mistaken belief in the union's majority status. The right of a majority not to be represented by a union it did not select is infringed no less when the employer erroneously believes in the majority status than when he does not. Accordingly, there is every reason to apply to Section 8(a)(2) the settled principle that prohibited conduct cannot be justified by "good faith" (*McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C.A. 7)), nor by the absence of evil "animus or desire" (*National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853 (C.A. 8)), nor by the "serious dilemma" of the employer's position (*National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 471 (C.A. 9)), nor by "good business reasons" (*Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 440 (C.A. 7)); in short, a statutory infraction is not condoned by the worthiness of the "motive" (*National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7); *National Labor Relations Board* v. *Perfect Circle Co.*, 162 F. 2d 566, 573 (C.A. 7)). See also the detailed discussion of "good faith" in *National Labor Relations Board* v. *Industrial Cotton*

Mills, 208 F. 2d 87, 91–92 (C.A. 4), certiorari denied, 347 U.S. 935.

Stated otherwise, the worst that can befall an employer who mistakenly recognizes a minority union as exclusive representative is an order that he cease such recognition unless and until the union's majority is established in a Board election.[20] Such an order entails no particular hardship on any of the parties; indeed, the employer in this case did not bother to resist its enforcement either here or in the court below. The union, too, unless it believes that it cannot command majority support in a free election, can have no objection to putting its claim of majority to a fair test. The contrary result would permit a good faith belief in a fact to create the fact itself. To borrow petitioner's example (Br. 44), the executor of an invalid will may receive compensation if he acted in good faith, but all his good faith cannot validate the will. So here, once the fact of lack of majority is established, a good faith belief in a contrary fact cannot justify permitting the mistakenly acquired status to continue.

The petitioner urges (Br. 31–32) that the "good faith" standard, applicable as a defense to a refusal to recognize a majority union, should be equally applicable as a defense where exclusive recognition is accorded a minority union. But, like the contention in *Brooks* v. *National Labor Relations Board*,

[20] That election, of course, would not be held until after there had been compliance with the Board's remedial order for a sufficient period of time, normally 60 days, to dissipate the effects of the prior unlawful recognition.

348 U.S. 96, 103–104, that informal methods of repudiating a bargaining agent should be as available as informal methods of selecting one, "This is to make situations that are different appear the same." To be sure, an employer who has a good faith doubt as to the union's majority status may, without violating the obligation imposed by Section 8 (a)(5) and (d) to bargain collectively with the representative of his employees, decline to recognize the union until its status is established in a Board election, even if the union in fact enjoys majority support at the time of the refusal. This result is necessary in order to accommodate Section 9(c), which provides an election procedure for the speedy resolution of representation questions in cases where a genuine doubt exists, and, furthermore, awaiting the outcome of that procedure involves no impairment of employee rights. In short, the election provides a reliable way in which the employer may obtain the facts, so that he need not act at his peril. However, as to other matters which cannot be resolved by the election procedure—such as whether a subject is "wages or other terms or conditions of employment" and thus within the area of mandatory bargaining—the employer's good faith, but mistaken, belief that the matter is not encompassed does not excuse his refusal to bargain about it.[21]

A good faith, but mistaken, belief that the union represents a majority of the employees is analogous

[21] See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342; *Inland Steel Company* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960.

to the latter situation. Contrary to the view of the dissenting judge in the court below (R. 139), where an employer grants exclusive recognition to a union which in fact represents only a minority, the error cannot be corrected by a prompt election, for the recognition gives the minority union "a marked advantage" in "securing the adherence of employees" (*Pennsylvania Greyhound, supra,* 303 U.S. at 267), and hence prevents a free expression of the employees' choice. Accordingly, the conditions which make it possible to give effect to the employer's good faith when he withholds recognition though the union actually has a majority, do not exist in the converse situation here.[22]

The petitioner's further contention (Br. 33–41) that, if the good faith standard is not applied, collec-

[22] The petitioner errs in suggesting (Br. 31–33) that the Board has failed to apply the good faith standard in the same way as it has in the past. The cases cited by petitioner, holding that the employer violates Section 8(a)(5) of the Act by demanding proof of the union's majority when he does not have a good faith doubt concerning it, all involve a situation where the union in fact represents a majority of the employees. This is entirely different from the situation here, where the union did not actually have a majority. For, where the union is in fact the majority representative, Section 8(a)(5) imposes an obligation on the employer to recognize and bargain with it, which obligation is suspended only if there is a question concerning the majority sufficient to invoke the Section 9(c) election procedure (see pp. 27–28, *supra*). But, where the union does not actually have a majority, the employer's good faith cannot supply one; there is thus no obligation to recognize the union as the exclusive representative, and, indeed, were the employer to do so, he would, no matter how well intentioned, abridge the right of the majority to be free of such a representative absent their consent.

tive bargaining will break down, is based on a misconception both of the problem and of the remedy.

In the first place, if an employer, unlike the one here, takes steps to verify the union's claim and ascertains that the union is in fact representing a majority, nothing in the Board decision here would preclude him from recognizing the union without a Board election. "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8.

Moreover, as shown, *supra*, even if the employer grants recognition and the union actually lacks a majority, no penalty attaches to a violation of Section 8(a)(2). The statutory scheme often requires a party to commit a "technical" unfair labor practice in order to test the validity of his position. Thus, an employer who challenges a unit determination, or the validity of an election, or the Board's jurisdiction must, under the law, refuse to bargain and run the risk of an unfair labor practice finding and court decree in order to secure judicial review testing the correctness of his contention. *A.F. of L.* v. *National Labor Relations Board*, 308 U.S. 401; *Norris* v. *National Labor Relations Board*, 177 F. 2d 26 (C.A. D.C.). In the same manner an employer who in good faith accepts a union's majority claim may have his position tested before the Board and the courts in an unfair labor practice proceeding. If the employer is proved wrong, either in failing to recognize or in recognizing, he is subjected to a remedial order tailored to the facts as established (*i.e.*, to bargain if the union

had a majority in an appropriate unit, or to stop bargaining if it did not), but no other penalty results.

For these reasons, the employer's good faith belief in the union's majority status has no bearing on whether his grant of exclusive recognition to a minority union constitutes unlawful assistance,' within the meaning of Section 8(a)(1) and (2) of the Act. We turn, therefore, to consider the propriety of the remedy prescribed in this case.

III. THE BOARD PROPERLY ORDERED THE COMPANY TO STOP RECOGNIZING THE UNION AND GIVING EFFECT TO ITS CONTRACT PENDING THE UNION'S ESTABLISHING ITS MAJORITY IN A BOARD ELECTION

The Board's remedial order, directs the Company to stop giving effect to its contract with the Union, which recognized the Union as the exclusive representative of its employees, and to withhold recognition from the Union unless and until the Union demonstrates its majority status in a Board election. The order is in the conventional form for cases of unlawful employer assistance, as approved by this Court as recently as *National Labor Relations Board* v. *District 50, United Mine Workers,* 355 U.S. 453. The gravamen of the offense here was extending exclusive recognition to a minority union, and a remedial order which calls for the cessation of such recognition unless and until the union attains proper status is thus "adapted to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 348).

Both the petitioner and the dissenting judge in the court below (Br. 76–79, R. 139) are of the view that the employees should be given an opportunity to re-

pudiate the Union or to select another bargaining representative. But the election they envisage would be conducted at a time while the Union still enjoyed the fruits of unlawful support. Enforcement of the Board's order is necessary to wipe out the consequences of the unfair labor practice, and the election contemplated by the Board can thereafter be conducted in an atmosphere permitting full freedom of choice. See *District 50, United Mine Workers, supra,* 355 U.S. at 463; p. 27, n. 20, *supra.*

Nor is the petitioner aided by pointing (Br. 109–110) to the majority it possessed at the time of the October, 1957, contract. The majority then acquired was achieved after the employer had unlawfully conferred exclusive recognition upon it. The purpose of the Board's order, however, is to restore as nearly as possible the status existing at the time of the unfair labor practice. Just as the Board may order an employer to grant exclusive recognition to a union which had a majority but lost it after unfair labor practices were committed, so may the Board order an employer to stop recognizing a union which had no majority but attained it after the commission of unfair labor practices. Cf. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 703–705. Any other result would permit a wrongdoer to profit by his own wrong. This is particularly true here where the underlying offense, exclusive recognition of a minority union, is calculated to assist it in obtaining employee support.

The petitioner's attack on the part of the order requiring the employer to cease giving effect to the

contract with the union is equally without merit. The situation here is distinguishable from that in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 236–238, relied on by petitioner (Br. 111–113). The Court there observed that "no basis [existed] for a finding that the contracts * * * were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective." 305 U.S. at 236. Precisely the opposite is true here: the execution of the August agreement was an unfair labor practice, the exclusive recognition there granted a minority union thwarted the statutory policy of majority rule, and cancellation of that recognition is the heart of the order. This Court in *Edison* was careful to note (305 U.S. at 236–237) that "the contracts [did not] make the [unions] exclusive representatives for collective bargaining." The contracts here did make the Union the *exclusive* bargaining representative and that is the unfair labor practice here involved. See also *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 361–367. Nor is the contract portion of the Board's order inconsistent with *National Labor Relations Board* v. *Gaynor News Co.,* 197 F. 2d 719, 724 (C.A. 2), affirmed, 347 U.S. 17 (Br. 114). There the union unquestionably represented a majority, but it had made an unlawful union security agreement. The court set aside the unlawful clause, but did not require a withholding of recognition from the union as that would have deprived the

majority of their bargaining rights. Here the unlawful clause is the clause granting exclusive recognition, and in practical effect this is the clause set aside by the Board's order, for the order specifically permits employees to retain substantive rights under the contract (R. 9–10). In short, just as in *Gaynor* preservation of majority rule led the court not to set aside the recognition features of the contract, so here preservation of majority rule requires a setting aside of those provisions pending an election.

IV. THE BOARD PROPERLY FOUND THAT THE UNION BY OBTAINING EXCLUSIVE RECOGNITION WHILE REPRESENTING ONLY A MINORITY OF THE EMPLOYEES VIOLATED SECTION 8(b)(1)(A) OF THE ACT

We have shown that the Company violated Section 8(a)(2) and (1) by granting exclusive recognition to a minority union, that the Company's good faith in so doing is irrelevant, and that the Board properly ordered the Company to withdraw exclusive recognition unless and until the Union wins a Board election. We turn finally to the related question of whether the Union violated Section 8(b)(1)(A) by obtaining recognition as the exclusive representative of all the employees in the unit even though it was only a minority choice. This question may properly be characterized as minor because if the Board's position is sustained vis-à-vis the employer, the practical consequences of the case are the same, whether or not a decree is also entered against the Union. It is doubtless for this reason that the Union devotes only two pages (Br. 72–74) to the issue.

Section 8(b)(1)(A) prohibits restraint and coercion of employees in the exercise of Section 7 rights. These rights include the right to self-organization and to collective bargaining through representatives of the employees' choosing, and the right to refrain from such activity. The law is settled that, when an employer unlawfully supports a union, he not only violates Section 8(a)(2) but also infringes on his employees' Section 7 rights, in violation of Section 8(a)(1). *Art Metals Constr. Co.* v. *National Labor Relations Board,* 110 F. 2d 148, 150 (C.A. 2); *National Labor Relations Board* v. *Newark Morning Ledger Co.,* 120 F. 2d 262, 265, n. 1 (C.A. 3). Accordingly, as shown, *supra,* pp. 12–25, the employer, by imposing a representative upon the majority of the employees, not only violated Section 8(a)(2) but also Section 8(a)(1). Since Section 8(b)(1)(A) was intended to impose on unions, wherever applicable, the same restrictions already imposed on employers respecting intrusion on employee rights,[23] a union which joins an employer in imposing unlawful restraint must be held to violate Section 8(b)(1)(A), just as the employer violated Section 8(a)(1).

There is nothing to the contrary in *National Labor Relations Board* v. *Drivers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274. The Court held that Section 8(b)(1)(A) did not prohibit peaceful picketing by a minority union to obtain recognition, and in so doing expressed the view that "§ 8(b)(1)(A) is a

[23] See S. Rep. No. 105, 80th Cong., 1st Sess., p. 50 (Supp. Views), I Leg. Hist. (1947) 456; 93 Cong. Rec. 4432, 4435, 4436, II Leg. Hist. (1947) 1199, 1204, 1207.

grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes" (at p. 290). We do not believe that, by this language or holding, the Court intended to place the union conduct here outside the scope of Section 8(b)(1)(A).

The determination that Section 8(b)(1)(A) should not be read to outlaw picketing by a minority union to obtain exclusive recognition entailed considerations not pertinent to the present case. In the *Curtis* situation it could be argued that it was illogical to make it unlawful for an employer to extend exclusive recognition to a minority union and not also proscribe a union from exerting economic pressure to attain that illegal object. The fault in the logic is that the line between minority picketing for recognition and minority picketing for organizational purposes is purely verbal; *i.e.*, the illegal object would disappear if the union were to forego any demand upon the employer or carefully to phrase its demand in terms of appealing to the employees to join so that recognition might be sought in the future, if majority support were obtained. The real issue in determining whether minority picketing for recognition should be outlawed really is whether, and to what extent, labor unions should be permitted to use peaceful picketing as a technique for organizing employees. This issue, in turn, goes to the very heart of the problem of balancing the relative power of employers and labor unions. The

Court, in *Curtis*, concluded that Congress would not have undertaken to enter this difficult area with a vague provision like Section 8(b)(1)(A). The legislative history of Section 8(b)(1)(A) also indicated that Congress did not intend thereby to interfere with the legitimate organizational techniques of unions, that Congress had dealt with the problem of picketing for recognition to a limited extent only in Section 8(b)(4)(C), and that Section 13 preserved the right to strike (and to engage in peaceful picketing) unless the Act specifically provided otherwise (see 362 U.S. at 282–288).[24]

These considerations do not apply to an employer's actual grant of exclusive recognition to a minority union. Proscribing the employer interference and any union complicity, unlike proscribing picketing to secure exclusive recognition, does not threaten traditional organizational weapons, nor does Section 13 caution against such a proscription. Thus, in the case of the conduct here, Section 8(b)(1)(A) may be given the equivalence with Section 8(a)(1), which it was generally intended to have (*supra*, p. 35), and consequently be interpreted to proscribe the action of a minority union in obtaining recognition as the employees' exclusive bargaining representative.[25]

It may be added that, it was understood before

[24] For a more elaborate exposition of the philosophy underlying this analysis and a discussion of its influence upon the 1959 amendments, see Cox, *Law and the National Labor Policy*, pp. 10–15, 23–31.

[25] *Miami Copper Co.*, 92 NLRB 322, 324, 340–341, relied on by petitioner (Br. 73) is like *Curtis*, *i.e.*, the union resorted to strike action to accomplish an unlawful aim.

Curtis that Section 8(b)(1)(A) was not limited to physical coercion of employees to forego their Section 7 rights, but included direct economic pressure as well—such as oral threats by union officials to employees that refusal to support the union would result in job loss,[26] or a contract which illegally required union membership as a condition of employment.[27] A contract granting exclusive recognition to a minority union imposes just as effective and immediate a restraint on the employees' Section 7 rights as does an oral threat of job loss or a contract requiring union membership as a condition of employment. For, with the execution of the contract, an employee is no longer free to bargain individually with the employer but must be represented by, and accept the bargain negotiated by, an agent who was not selected by a majority of the employees. And the union, as we have pointed out above, thereby secures an unwarranted advantage in soliciting future support.

For these reasons, the holding in *Curtis* is not dispositive of the issue whether the union action here violated Section 8(b)(1)(A). As the court below observed (R. 136):

> The instant cases involve much more direct interference and restraint of §7 rights than did the *Curtis Bros.* case. In the instant cases the recognition of the minority union is a *fait*

[26] See *National Labor Relations Board* v. *Local 404, Teamsters*, 205 F. 2d 99, 101–102, n. 2 (C.A. 1); *Lane* v. *National Labor Relations Board*, 186 F. 2d 671, 674 (C.A. 10).

[27] See *Communications Workers* v. *National Labor Relations Board*, 215 F. 2d 835, 837–838 (C.A. 2); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 944 (C.A. 3).

accompli depriving the majority of employees of their guaranteed right to choose their own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A).[28]

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
FREDERICK U. REEL,
HERMAN M. LEVY,
Attorneys,
National Labor Relations Board.

MARCH 1961.

[28] If we are correct in our view that the Union violated Section 8(b)(1)(A) by obtaining exclusive recognition when it did not represent a majority of the employees, the provisions of the Board's order requiring the Union to cease acting as such representative and giving effect to the contract, until its majority is demonstrated in a Board election (R. 11), are appropriate for the same reason that a comparable sanction was proper in the case of the employer (see p. 31–34, *supra*).

U. S. GOVERNMENT PRINTING OFFICE: 1961

Office-Supreme Court, U.S.
FILED
APR 15 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents.*

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

MORRIS P. GLUSHIEN
1710 Broadway
New York 19, New York

CHARLES J. MORRIS
1601 National Bankers
Life Building
Dallas 1, Texas

L. N. D. WELLS, JR.
1601 National Bankers
Life Building
Dallas 1, Texas

RUTH WEYAND
1346 Connecticut Ave., N.W.
Washington 6, D.C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

I. The Board's brief concedes that only exclusive recognition need be withdrawn 2

II. Authority upon which Board brief relies finds nothing illegal in a union protecting the standards of its members by forcing an employer to maintain union wages and other conditions of employment for a non-union majority 6

III. There are no decisions by the National Labor Relations Board other than that in the instant case holding that exclusive recognition of a minority union without more constitutes an unfair labor practice or that employee efforts to secure such recognition do not constitute protected concerted activity 11

IV. The legislative history of the various appropriate riders and the subsequent Landrum-Griffin Act amendments do not establish that Congress meant by Section 8 (a) (1) and (2) or Section 8 (b) (1) (A) to ban exclusive recognition of minority unions 15

CITATIONS

CASES:

Guy F. Atkinson Co., 90 N.L.R.B. 143, enforcement denied on other grounds, 195 F. 2d 141 (C.A. 9) .. 11

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 239 ..... 4, 5

Dixie Bedding Mfg. Co. v. N.L.R.B., 5th Cir., 1959, 268 F. 2d 901 11

Ekco Products Co., 1957, 117 N.L.R.B. 137 14

Elastic Stop Nut Corp. v. N.L.R.B., 8th Cir., 1944, 142 F. 2d 37 12

Daniel Hamm Drayage Co., 84 N.L.R.B. 458, enforced 5th Cir., 1951, 185 F. 2d 1020 11

Hoover Co. v. N.L.R.B., 6th Cir., 1951, 191 F. 2d 380 ..... 13, 14

N.L.R.B. v. Brashear Freight Lines, 8th Cir., 1941, 119 F. 2d 379 13

N.L.R.B. v. Buzza Cardozo, 9th Cir., 1953, 205 F. 2d 889, certiorari denied, 346 U.S. 923 13

Page

N.L.R.B. v. Corning Glass Works, 1st Cir., 1953, 204 F. 2d 422 12
N.L.R.B. v. Electronics Equipment Co., 2nd Cir., 1952, 205 F. 2d 296 13
N.L.R.B. v. Masters-Lake Success, Inc., 2nd Cir., 1961, 47 L.R.R.M. 2607 11
N.L.R.B. v. National Container Corp., 2nd Cir., 1954, 211 F. 2d 525 11
N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261 12
National Motor Bearings Co., 5 N.L.R.B. 409, enforced on this point, 9th Cir., 1939, 105 F. 2d 652 11
Safeway Stores, Inc., 111 N.L.R.B. 968 11
John B. Shriver Co., 103 N.L.R.B. 23 11
Stein and Calder, 46 N.L.R.B. 129 11
Sunbeam Corp., 99 N.L.R.B. 546 11
District 50, United Mine Workers v. N.L.R.B., 4th Cir., 1956, 234 F. 2d 565 11

STATUTES:

Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401, *et seq.* 16

National Labor Relations Act, 61 Stat. 136, 29 U.S.C. 150, *et seq.*

Section 8 (a) (1) 15
Section 8 (a) (2) 15
Section 8 (a) (3) 9, 11
Section 8 (b) (1) (A) 15
Section 8 (b) (2) 9
Section 8 (b) (7) 6
Section 8 (f) 16

MISCELLANEOUS:

Brown, Emily Clarke, The New Collective Bargaining in Mass Production: Methods, Results, Problems, 47 Journ. Pol. Econ. 30 (February 1939) 10
89 Cong. Rec. 6566-6567 15
Cox, Archibald, Law and the National Labor Policy, pp. 10-15, 23-31 ..... 6, 7, 8, 10
U. S. Dept. of Labor, Collective Bargaining in the Basic Steel Industry, 1961, pp. 232-233 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents*.

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

We find nothing which requires answer in the Board's brief respecting our points that good faith is the proper standard for determining majority or, if it is not, that the admitted union majority which existed at the time the October 10, 1957 contract was signed could not be destroyed by any technical viola-

tion of law which might have inhered in a mistake as to the true majority on August 30, 1957. If we are correct on either of these points, there can be no possible basis for setting aside in any part the October 10, 1957 contract between the Union and the Employer.

I.

The Board's brief concedes that only exclusive recognition need be withdrawn.

Even if there were any defect in majority on October 10, 1957, at most the exclusive recognition clause in the agreement should be set aside, leaving the contract between the Union and the Employer otherwise in full force and effect. The Board's brief repeatedly states (pp. 2, 5-6, 8, 9, 27, 30-31, 33, 34) that the mistake as to majority here made carries no penalty but merely bars exclusive recognition. Thus, the Board's brief states (p. 34): "Here the unlawful clause is the clause granting exclusive recognition, and in practical effect this is the clause set aside by the Board's order * * *." But the Board's order by its terms expressly sets aside the whole contract (R. 9-11) and also enjoins the Employer from dealing with the Union as the representative of a single employee, even its own members, on any matter, whether grievances or otherwise, until certified (R. 9).

The Board's brief (p. 6, n. 4) likewise states that "The Board's order, however, did not require the Company to vary or abandon any term or condition of employment established in the performance of the agreement." But it left the employer free to do so. The agreement conferred contractual rights to improved wages (R. 99-100), hours of employment (R. 99), no discharge without good cause (R. 101),

fair distribution of work (R. 101-102), health, welfare, hospital and surgical benefits (R. 103-104), with a grievance and arbitration system for enforcement (R. 109-110), all of which fall if the contract is declared invalid as to the only two parties to it. The contract expressly provides (R. 110):

> "Neither party shall institute any action or proceeding in court of law or equity, state or federal, other than to compel arbitration, as provided in this agreement, or to enforce the award of an arbitrator. This provision shall be a complete defense to any action or proceeding instituted contrary to this agreement."

To set aside this contract as to the Union is to deprive employees of any manner of enforcing it. The Board's statement that the order protects the substantive rights of employees (Board Br., p. 34) is unrealistic because the contract never accorded employees rights except through the Union.

The Board's brief, by failing to defend these various provisions in the Board's order and arguing that, in practical effect, only a withdrawal of exclusive recognition ensues from a good faith mistake, in substance confesses error as to the breadth of the order here issued. If any provision in the October 10, 1957 contract is to be set aside, it can only be the exclusive recognition clause. All the substantive terms of the contract must be left in full force and effect as binding contractual obligations between the Union and Employer. The Employer and the Union must continue to be able to process grievances and enforce the arbitration procedures of the contract, with the Employer still contractually obligated to deal with the Union as

the representative of any employee who seeks to have the Union represent him in processing grievances.

This is the concept of withdrawal of exclusive recognition which this Court adopted in the case of *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 239. There Subdivision (g) of Paragraph one of the Board's order required the employers to cease recognizing the Brotherhood "as the exclusive representative of their employees." This Court in upholding this provision stated (305 U.S., at p. 239):

> "We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the act."

The Board in its brief (p. 33) attempts to distinguish the *Consolidated Edison* case on the ground that the contracts there involved did not make the union the exclusive representative for purposes of collective bargaining. In the *Consolidated Edison* case the Board had found that although the contracts recited only that the employer recognized the union as the agent of its members, the contracts had been entered into and treated by the employer as exclusive recognition contracts at a time when two independent labor organizations were seeking recognition. In regard to exclusive recognition the Board stated (4 N.L.R.B. 71, 93):

> "Carlisle [who was in charge of the employer's labor relations] testified that the contracts were applicable to all employees and were exclusive collective bargaining contracts—i.e., that the respondent would not enter into collective bargaining agreements with any other labor organization dur-

> ing the existence of the contracts. He thus in effect admitted that he recognized and entered into contracts with the I.B.E.W. locals as the exclusive bargaining representatives of the respondents' employees at a time when he did not know the size of the membership * * *."

This finding was not set aside by either the court of appeals or this Court.

The contracts involved in the *Consolidated Edison* case are printed in the Record in that case, at pp. 1394-1405 and 1419-1430. Although the recognition and scope clauses accord the union recognition only as the representative of its members, the provisions as to all substantive terms, such as wage increases (R. 1397-1398), work week and overtime (R. 1395-1396), seniority (R. 1399) and vacations (R. 1396) are by their terms applicable to all employees. Only the adjustment of grievance and arbitration provisions (R. 1400) are by their terms applicable only to union members.

In refusing to set aside these contracts, even though the parties, at the time two rival unions were competing for recognition, had treated the contracts as according exclusive recognition, and Consolidated Edison had committed substantial acts of discrimination and interference, this Court set a precedent applicable here, as we have argued more fully in our main brief, pp. 21, 26, 37, 67, 96, 111-113.

II.

Authority upon which Board brief relies finds nothing illegal in a union protecting the standards of its members by forcing an employer to maintain union wages and other conditions of employment for a non-union majority.

The Board's brief (p. 37, n. 24) refers this Court to a monograph by Archibald Cox entitled *Law and the National Labor Policy*, pp. 10-15, 23-31, for "a more elaborate exposition of the philosophy underlying" the analysis presented by the Board with respect to the problem of picketing by a minority union for exclusive recognition. This monograph takes the position that despite the concern of the law with preserving to each employee the right to freedom of choice regarding union representation, unions may protect the standards of their members not alone by achieving majority designations but also, if they cannot organize the majority, by driving the product of non-union labor off the market or driving the wages and working conditions of non-union employees up to the union level, when this is essential to preserve union standards. Thus, in commenting on Section 8 (b) (7) of the National Labor Relations Act, enacted subsequent to events here involved, the monograph states (at pages 27-28):

> "Banning organizational picketing after an N.L.R.B. election partially rejects the struggle for life, for it prefers the nonunion employees' interest in self-determination over the union's interest in spreading its organization as a means of protecting its wage scale and labor standards. Suppose, however, that a union were to picket for the avowed purpose of publicizing the low wages paid in an establishment, without becoming the bargaining representative, in order to compel the

owner to raise his wages to the union scale or else to prevent the distribution of the low-cost, nonunion goods in direct competition with the product of union labor. NLRA section 8 (b) (7) prohibits picketing only

> where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or . . . the employees of an employer to accept or select such labor organization as their collective bargaining representative . . .

"The very few men close to the drafting of the Conference Report who understood this problem had no common intention—perhaps 'had conflicting intentions' would be a better phrase. Presumably, the N.L.R.B. will follow the decisions under section 8 (b) (4) (C) which hold that picketing in support of a demand which is customarily made in collective bargaining is picketing for recognition. I am inclined to think that the rule is wrong in principle, and it is opposed by judicial rulings distinguishing organizational picketing from picketing to protest competition of non-union goods. The prohibition seeks to protect the employees' decision concerning union representation, not their freedom to work at substandard wages without reprisal from those whom they injure. The union's objective of eliminating the competition based upon differences in labor standards can be accomplished without interfering with the employees' decision concerning union representation. There is some risk that this approach would encourage the kind of verbal evasions which I criticized earlier, but the danger can be eliminated by treating the union's objective as a question of fact which requires looking behind the ostensible purpose. Regardless of what the union may say, recognition is an objective of any picketing of an

unorganized shop, but the force of this presumption, based upon experience, can be dissipated by proof that the labor conditions of which the union complains are presently such an immediate and substantial threat to existing union standards in other shops through the force of competition as to support a finding that the union has a genuine interest in compelling the improvement of labor conditions or eliminating the competition even though the union does not become the bargaining representative." (Footnotes omitted.)

We agree with Solicitor General Cox that there is nothing in the law which prevents a union from protecting the standards of its members by either eliminating the non-union labor or requiring that non-union labor receive union wages and conditions. Solicitor General Cox does not tell us whether he envisages the union as having the right of picketing only until the owner of the non-union plant does in fact raise his wages to the union scale or whether the union can also secure a contract for the payment of union wages to non-union employees for a fixed term. It is completely unrealistic to require the union to maintain a vigil and resume picketing whenever wages drop. If the union can picket to compel the owner of a non-union plant to pay his non-union employees union wages, it would seem that the union can legally contract with the employer for the payment of union wages to non-union employees. And if a union can contract with an employer for the payment of union wages to non-union employees, it should be immaterial whether this occurs with respect to a plant which is wholly non-union or one in which the union has less than a majority of the members.

The Solicitor General Cox would limit such picketing to a situation where union standards are threatened by the competition of lower priced goods produced by non-union labor. But lower paid non-union employees are always a threat to the standards of union employees.

Here the employer was willing to give a five percent increase to all its employees by entering into a contract with the union for such an increase (R. 99). If the union was not legally privileged to enter into that contract without majority status, the legitimate aspirations of its members for an agreement for higher wages for a fixed term of years would have been defeated. It would have been defeated by the failure of the majority of the employees in the plant to join the union. The non-union majority would have kept the economic status of the union members below that which their economic strength could win for them.

To avoid this result is just as legitimate a basis for permitting the union members, though a minority, to bring up the wages of the non-union majority as would the Solicitor General's example of the right to raise the labor cost of producing lower priced goods which are driving down standards of union members.

The Board's brief (p. 12, n. 7) seems to assume that the minority union should contract for wage increases for its members only. But if that were done the Board might readily hold that such a contract encourages union membership contrary to Section 8 (a) (3) and (b) (2), unless it were construed as imposing an obligation on the employer to pay non-union employees the same rates, in which instance we would in substance have the contract which the Board has here ordered set aside.

The Board's brief seems to proceed upon the assumption that to the extent that an employer contracts with a union to fix the wages or conditions of employment of non-union members it recognizes the union as the representative of the non-union members. The Board's brief (p. 14) characterizes this as "top down" organizing. But our point is, as Solicitor General Cox clearly recognizes, that there is a difference between forcing non-union employees into an organization and giving them the benefit of union standards. The non-union employees are not forced to organize because they are given union conditions. The Board's failure to distinguish these two very different things led the Board to the conclusion that only when the non-union members constitute a minority in a union in which the majority have selected the union, can the union fix their wages and conditions of employment. This would completely exclude the situation which Solicitor General Cox in his above quoted monograph argues is legal and justifiable, namely, the right to fix wages and conditions of employment for a non-union majority to protect standards of union members. Nor does the Board point to anything in the statute itself, its legislative history or the Board or court decisions which exclude the right of the union to contract for wages and terms of employment for a non-union majority. On the contrary, we believe that the extensive analysis of the National Labor Relations Act and its legislative history showing Congress intended to preserve this traditional practice of trade unions,[1] as set out in our

[1] Since filing our main brief a new study entitled Collective Bargaining in the Basic Steel Industry, U. S. Dept. of Labor, 1961, pp. 232-233, has described the manner in which bargaining on a members only basis in that industry resulted in contracts fixing wages for all employees in the unit. See also Emily Clarke Brown, The New Collective Bargaining in Mass Production: Methods, Results, Problems, 47 Journ. Pol. Econ. 30, 35-37 (February 1939).

main brief, pages 62-92, stands completely unimpaired by anything in the Board's brief.

III.

There are no decisions by the National Labor Relations Board other than that in the instant case holding that exclusive recognition of a minority union without more constitutes an unfair labor practice or that employee efforts to secure such recognition do not constitute protected concerted activity.

The Board's brief fails to cite a single case other than the instant case in which the mere conferral of exclusive recognition upon a minority union was held by either the Board or the court to constitute an unfair labor practice. In most of the cases cited in the Board's brief for the proposition that an employer commits an unfair labor practice by granting exclusive recognition to a minority union, the grant of exclusive recognition was accompanied by a union security provision which Section 8 (a) (3) expressly bars with a minority union.[2] In all the other cases there was either a rival union claiming exclusive representation rights[3]

[2] There were union security clauses with a minority union in *Daniel Hamm Drayage Co.*, 84 N.L.R.B. 458, enforced 185 F. 2d 1020 (C.A. 5) and *Guy F. Atkinson Co.*, 90 N.L.R.B. 143, enforcement denied on other grounds, 195 F. 2d 141 (C.A. 9), both cited Board Brief, p. 15, n. 13; in *Dixie Bedding Mfg. Co.* v. *N.L.R.B.*, 208 F. 2d 901 (C.A. 5) cited Board Brief, p. 16; in *National Motor Bearing Co.*, 5 N.L.R.B. 409, enforced on this point, 105 F. 2d 652 (C.A. 9), *Stein and Calder*, 46 N.L.R.B. 129, *Sunbeam Corp.*, 99 N.L.R.B. 546; *John B. Shriver Co.*, 103 N.L.R.B. 23; *Safeway Stores, Inc.*, 111 N.L.R.B. 968, all five cited Board Brief, p. 16, n. 15; and in *N.L.R.B.* v. *Masters-Lake Success, Inc.*, 47 L.R.R.M. 2607, 2608 (C.A. 2), February 15, 1961, cited Board Brief, p. 17.

[3] There were rival unions claiming representation rights in *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525 (C.A. 2), *District 50, United Mine Workers* v. *N.L.R.B.*, 234 F. 2d 565 (C.A.

or such employer domination of the recognized organization as to render it incapable of serving as a genuine employee representative.[4] Where an employer confers recognition on one of two rival unions claiming majority representation the Board and the courts have relied upon the disparate treatment as the type of employer interference with the employees' freedom to choose their own representative which the Act condemns. When there are not two unions, recognition does not carry this element of taking sides in a contest between two organizations. Moreover when it turns out that the employer recognized the minority union whereas the other union was the majority choice, the employer has violated his duty to bargain exclusively with the majority choice.

Every case cited in the Board's brief not only has present as a factual matter, but shows reliance upon, factors other than the mere grant of recognition to a minority union in finding an unfair labor practice.

Nor do we know of any case in which the Board has held that employee conduct directed at securing exclusive recognition for a minority union is not protected within the meaning of Section 7 of the Act. In each of the cases cited by the Board's brief (p. 15) for the proposition that strikes and picketing designed to compel recognition of a minority union are not protected by Section 7, the Board had held the conduct protected and ordered the reinstatement of employees

4). *Elastic Stop Nut Corp.* v. *N.L.R.B.*, 142 F. 2d 37 (C.A. 8) and *N.L.R.B.* v. *Corning Glass Works*, 204 F. 2d 422 (C.A. 1), all cited Board Brief, pp. 17-18.

[4] *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271, cited Board Brief, pp. 7, 8, 13, 29.

who went on such strikes or were discharged for such conduct. Thus in *N.L.R.B.* v. *Brashear Freight Lines*, 8th Cir., 1941, 119 F. 2d 379, cited in the Board's brief, p. 15, the Board ordered reinstatement of employees who struck in support of demands that their employer bargain with a minority union. The court (119 F. 2d at 382) refused to enforce reinstatement, apparently on the ground that like economic strikers, by going on strike, the employees took the chance of being replaced. We find no word in the court's decision which suggests that it would have been illlegal for the employer to bargain with a minority union or that striking to secure such bargaining was not a protected activity. See *N.L.R.B.* v. *Buzza-Cardozo*, 9th Cir., 1953, 205 F. 2d 889, 890, certiorari denied, 346 U.S. 923, where, in enforcing a Board order reinstating employees who without majority support struck for a wage increase, the court distinguished the *Brashear* case:

> "Respondent, relying on *N.L.R.B.* v. *Brashear Freight Lines*, 8 Cir., 119 F. 2d 379, contends that the concerted activity was a wildcat strike and as such unprotected. That case, however, is authority for no more than the proposition that the employees who struck did so at the risk of having their places filled with new employees during the pendency of the strike. There is a difference between an employer's duty not to discharge employees for striking and his right to deny reinstatement to economic strikers whose jobs he had filled during the course of the strike in order to continue his operations."

In both the cases of *Hoover Co.* v. *N.L.R.B.*, 6th Cir., 1951, 191 F. 2d 380 and *N.L.R.B.* v. *Electronics Equipment Co.*, 2nd Cir., 1952, 194 F. 2d 650, cited in the Board's brief, pp. 15-16, the Board had held employee

efforts to secure exclusive recognition for a labor organization protected even though a rival union was claiming representation rights, an election under the auspices of the Board was pending and in the *Hoover* case even after a rival union had been certified. While the courts refused to enforce the Board's orders insofar as they directed reinstatement of these employees, the courts were manifestly concerned with strike and boycott activity which sought recognition for one of two rival unions in defiance of pending Board elections or certifications.

So far as we have been able to ascertain the Board in recent years has recognized that a question may exist as to whether a strike for recognition of a minority union is a protected concerted activity, but has found it unnecessary to pass on the issue. See for instance *Ekco Products Co.*, 1957, 117 N.L.R.B. 137, 144, where the Board said:

> "As in any event, we find from the record that the Mine Workers represented a majority, we need not pass on the question whether a strike for recognition by a minority union is a protected concerted activity.[18]
>
> [18] Compare *N.L.R.B.* v. *Buzza-Cardozo*, 205 F. 2d 889 (C.A. 9) with *N.L.R.B.* v. *Braskear Freight Lines, Inc.*, 119 F. 2d 379 (C.A. 8)."

We respectfully submit that the broad assertions in the Board's brief, pp. 7, 12-19, that the Board has always held recognition of a minority union unlawful are not supported by the authorities cited.

IV.

The legislative history of the various appropriation riders and the subsequent Landrum-Griffin Act amendments do not establish that Congress meant by Section 8 (a) (1) and (2) or Section 8 (b) (1) (A) to ban exclusive recognition of minority unions.

The Board's brief (pp. 19-20) argues that the Congress by riders on the Board's appropriations from 1944 to 1948 placing a three months statute of limitations on complaints to invalidate any contract between management and labor, showed that Congress regarded exclusive recognition of minority unions as unlawful. The Board, however, cites nothing from the legislative history of these riders and we have been unable to find anything which indicates that Congress was concerned about exclusive recognition of minority unions as such. As the Board's brief, p. 20, indicates, the riders were originally designed to prevent the Board from setting aside closed shop contracts with Kaiser Shipbuilding Corporation, even though the contracts were entered into when only a mere handful of the potential work force had been hired. In enacting the riders Congress expressly placed stability of collective bargaining agreements ahead of even the right to work without joining a union (89 Cong. Rec. 6566-6567). While in 1948 the rider was narrowed to impose such a statute of limitations only on agreements between employers and unions designated by a majority, there is no logical inference that Congress had in mind exclusive recognition of unassisted minority unions which were engaged in genuine arm's length bargaining. There were several other clearly recognized unfair labor practices to which the limitation was directed, as for instance union security agreements with minority unions or contracts with company dominated unions.

The reference to "sweetheart" contracts, which the Board's brief (p. 20) quoted, covers a concept of employer collusion with a minority union completely inconsistent with genuine arm's length bargaining with a minority union.

Neither the fact that Congress by the Landrum-Griffith Act legalized prehire contracts nor the legislative history of this provision shows Congress regarded exclusive recognition of minority unions as illegal *per se*. Congress did take cognizance of the fact that the Board's decision in the instant case would prevent such prehire contracts and hence expressly legislated to avoid the application of the rule of the instant case in such circumstances. (See material quoted Board brief, p. 22). But referring to the instant case to explain the need for express legalization of prehire contracts cannot establish that Congress deemed the present case correctly decided.

The chief features of the prehire contract legalization are the union shop features and the hiring hall features which appear as Subparagraphs (2), (3) and (4) of Section 8 (f). The Board omits these provisions when it quotes from Section 8 (f), Board brief, p. 21, n. 18. When the legislative history is read in the context of legalizing a union shop and hiring hall arrangement with a union not selected by any employees, there can be no substantial weight to any assumption that Congress believed that, but for its newly

created exception, mere exclusive recognition of a minority union was illegal *per se*.

Respectfully submitted,

MORRIS P. GLUSHIEN
1710 Broadway
New York 19, New York

CHARLES J. MORRIS
1601 National Bankers
Life Building
Dallas 1, Texas

L. N. D. WELLS, JR.
1601 National Bankers
Life Building
Dallas 1, Texas

RUTH WEYAND
1346 Connecticut Ave., N.W.
Washington 6, D.C.

Counsel for Petitioner

April 14, 1961.

SUPREME COURT OF THE UNITED STATES

No. 284.—October Term, 1960.

International Ladies' Garment Workers' Union, AFL–CIO, Petitioner, v. National Labor Relations Board and Bernhard-Altmann Texas Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 5, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

We are asked to decide in this case whether it was an unfair labor practice for both an employer and a union to enter into an agreement under which the employer recognized the union as exclusive bargaining representative of certain of his employees although in fact only a minority of those employees had authorized the union to represent their interests. The Board found[1] that by extending such recognition, even though done in the good-faith belief that the union had the consent of a majority of employees in the appropriate bargaining unit, the employer interfered with the organizational rights of his employees in violation of § 8 (a)(1) of the National Labor Relations Act and that such recognition also constituted unlawful support to a labor organization in violation of § 8 (a)(2).[2] In addition, the Board found that

[1] Except for filing an answer, the employer Bernhard-Altmann Texas Corporation did not resist enforcement of the Board's order and has not sought review in this Court.

[2] Section 8 (a)(1) and (2), insofar as pertinent, provide:

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . ." 61 Stat. 140, 29 U. S. C. § 158 (a)(1), (2).

the union violated § 8 (b)(1)(A)[3] by its acceptance of exclusive bargaining authority at a time when in fact it did not have the support of a majority of the employees, and this in spite of its bona fide belief that it did. Accordingly, the Board ordered the unfair labor practices discontinued and directed the holding of a representation election. The Court of Appeals, by a divided vote, granted enforcement, 280 F. 2d 616. We granted certiorari. 364 U. S. 811. We agree with the Board and the Court of Appeals that such extension and acceptance of recognition constitute unfair labor practices, and that the remedy provided was appropriate.

In October 1956 the petitioner union initiated an organizational campaign at Bernhard-Altmann Texas Corporation's knitwear manufacturing plant in San Antonio, Texas. No other labor organization was similarly engaged at that time. During the course of that campaign, on July 29, 1957, certain of the company's Topping Department employees went on strike in protest against a wage reduction. That dispute was in no way related to the union campaign, however, and the organizational efforts were continued during the strike. Some of the striking employees had signed authorization cards solicited by the union during its drive, and, while the strike was in progress, the union entered upon a course of negotiations with the employer. As a result of those negotiations, held in New York City where the home offices of both were located, on August 30, 1957, the employer and union signed a "memorandum of understanding." In that memorandum the company recognized the union as

---

[3] Section 8 (b)(1)(A) provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A).

exclusive bargaining representative of "all production and shipping employees." The union representative asserted that the union's comparison of the employee authorization cards in its possession with the number of eligible employees representatives of the company furnished it indicated that the union had in fact secured such cards from a majority of employees in the unit. Neither employer nor union made any effort at that time to check the cards in the union's possession against the employee-roll, or otherwise, to ascertain with any degree of certainty that the union's assertion, later found by the Board to be erroneous,[4] was founded on fact rather than upon good faith assumption. The agreement, containing no union security provisions, called for the ending of the strike and for certain improved wages and conditions of employment. It also provided that a "formal agreement containing these terms" would "be promptly drafted . . . and signed by both parties within the next two weeks."

Thereafter, on October 10, 1957, a formal collective bargaining agreement, embodying the terms of the August 30 memorandum, was signed by the parties. The bargaining unit description set out in the formal contract, although more specific, conformed to that contained in the prior memorandum. It is not disputed that as of execution of the formal contract the union in fact represented a clear majority of employees in the appropriate unit.[5] In upholding the complaints filed against the em-

---

[4] The Board found that as of August 30 the union in fact had authority to represent either 70 employees out of a relevant total of 280, or 158 out of 368, depending upon the criteria used in determining employee eligibility. "Accordingly, the Union could not, under any circumstances, have represented a majority of the employees involved on August 30, 1957." 122 N. L. R. B. 1289, 1291–1292.

[5] The Court of Appeals considered irrelevant the achievement of majority status during the period that the union maintained the unlawful agreement. 280 F. 2d 616, 619, note 3.

ployer and union by the General Counsel, the Board decided [6] that the employer's good-faith belief that the union in fact represented a majority of employees in the unit on the critical date of the memorandum of understanding was not a defense, "particularly where, as here, the Company made no effort to check the authorization cards against its payroll records." 122 N. L. R. B. 1289, 1292. Noting that the union was "actively seeking recognition at the time such recognition was granted," and that "the Union was [**not**] the passive recipient of an unsolicited gift bestowed by the Company," the Board found that the union's execution of the August 30 agreement was a "direct deprivation" of the nonconsenting majority employees' organizational and bargaining rights. At pp. 1292, 1293, note 9. Accordingly, the Board ordered the employer to withhold all recognition from the union and to cease giving effect to agreements entered with the union; [7] the union was ordered to cease acting as bargaining representative of any of the employees until such time as a Board-conducted election demonstrated its majority status, and to refrain from seeking to enforce the agreements previously entered.

The Court of Appeals found it difficult to "conceive of a clearer restraint on the employees' right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees." 280 F. 2d, at 619. The court distinguished our decision in *Labor Board v. Drivers Local Union No. 639 (Curtis Bros.)*, 362 U. S. 274, on the ground that there was

---

[6] Member Fanning agreed with a majority of the Board that the employer violated § 8 (a) (1) and (2), but dissented as to the finding of union violation of § 8 (b) (1) (A). 122 N. L. R. B. 1289, 1297.

[7] However, the terms and conditions of employment fixed by the agreement were not required to be varied or abandoned. We take it that the Board's order restraining the union and employer from dealing will, in any event, terminate after the election is held.

involved here neither recognitional nor organizational picketing. The court held that the bona fides of the parties was irrelevant except to the extent that it "was arrived at through an adequate effort to determine the true facts of the situation." At p. 622.

At the outset, we reject as without relevance to our decision the fact that, as of the execution date of the formal agreement on October 10, petitioner represented a majority of the employees. As the Court of Appeals indicated, the recognition of the minority union on August 30, 1957, was "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative." 280 F. 2d, at 621. It is, therefore, of no consequence that petitioner may have acquired by October 10 the necessary majority if, during the interim, it was acting unlawfully. Indeed, such acquision of majority status itself might indicate that the recognition secured by the August 30 agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support.

Nor does this case directly involve a strike. The strike which occurred was in protest against a wage reduction and had nothing to do with petitioner's quest for recognition. Likewise, no question of picketing is presented. Lastly, the violation which the Board found was the grant by the employer of exclusive representation status to a minority union, as distinguished from an employer's bargaining with a minority union for its members only. Therefore, the exclusive representation provision is the vice in the agreement, and discussion of "collective bargaining," as distinguished from "exclusive recognition," is pointless.[4] Moreover, the insistence that we hold the

[4] Relying upon reference to § 9 decertification proceedings, petitioner contends that such a contract with a minority union does not prevent employees from exercising complete freedom. The availability of such a remedy is doubtful in view of the Board's position that

labor practices here involved. The act made unlawful by § 8 (a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.[12]

This conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the union. It merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative. The Board's order here, as we might infer from the employer's failure to resist its enforcement, would apparently result in similarly slight hardship upon it. We do not share petitioner's apprehension that holding such conduct unlawful will somehow induce a breakdown, or seriously impede the progress of collective bargaining. If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. Moreover, no penalty is attached to the violation. Assuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested in an

[12] See *Labor Board* v. *Perfect Circle Co.*, 162 F. 2d 566; *Labor Board* v. *Illinois Tool Works*, 153 F. 2d 811; *McQuay-Norris Mfg. Co.* v. *Labor Board*, 116 F. 2d 748; and cf. *Labor Board* v. *Industrial Cotton Mills*, 208 F. 2d 87.

unfair labor practice proceeding.[13] If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act, as was the case here. No further penalty results. We believe the Board's remedial order is the proper one in such cases. *Labor Board* v. *District 50 U. M. W.*, 355 U. S. 453.

Affirmed.

[13] Section 8 (a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." 61 Stat. 141, 29 U. S. C. § 158 (a)(5).

SUPREME COURT OF THE UNITED STATES

No. 284.—October Term, 1960.

International Ladies' Garment Workers' Union, AFL–CIO, Petitioner, v. National Labor Relations Board and Bernhard-Altmann Texas Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 5, 1961.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting in part.

I agree that under the statutory scheme, a minority union does not have the standing to bargain for all employees. That principle of representative government extends only to the majority. But where there is no majority union, I see no reason why the minority union should be disabled from bargaining for the minority of the members who have joined it.[1] Yet the order of the Board, now approved, enjoins petitioner union from acting as the exclusive bargaining representative "of any of the employees," and it enjoins the employer from recognizing the union as the representative of "any of its employees."

We have indicated over and again that, absent an exclusive agency for bargaining created by a majority of workers, a minority union has standing to bargain for its members. In *Virginian R. Co.* v. *Federation*, 300 U. S.

[1] The collective bargaining agreement in the present case undertakes to make the union "the sole and exclusive bargaining representative" for all workers in the bargaining unit. Article II. But the agreement also contains a separability clause—that if "any provision" is held "invalid," the remainder of the agreement is not affected. Article XXIX.

515, 549, note 6, the Court quoted with approval a concession that "If the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions."

That case was under the Railway Labor Act. But it has been followed under the National Labor Relations Act. In *Edison Co.* v. *Labor Board*, 305 U. S. 197, a union, the Brotherhood of Electrical Workers, was allowed to act as a bargaining representative for the employees who were its members, even though they were a minority. The Court said, ". . . in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice." *Id.*, 237. Maintenance of the status of a minority union, until an election was held, might well serve the purpose of protecting commerce "from interruptions and obstructions caused by industrial strife." *Id.*, 237. A decree requiring the employer from ceasing to recognize the Brotherhood as the exclusive representative of its members was modified:

> "The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. We construe [the order] as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the [union] should be established in accordance with the Act." *Id.*, 239.

It was in that tradition that we recently sustained the right of a minority union to picket peacefully to compel

recognition. *Labor Board* v. *Drivers Local Union*, 362 U. S. 274. There a minority union sought to compel exclusive representation rights. To be sure, this Court recognized in that case that "tension exists between . . . [the] right to form, join or assist labor organizations and [the] right to refrain from doing so." *Id.*, 280. But when a minority union seeks only to represent its own, what provision of the Act deprives it of its right to represent them, where a majority have not selected another union to represent them?

Judge Learned Hand in *Douds* v. *Local 1250*, 173 F. 2d 764, 770, stated that "the right to bargain collectively and the right to strike and induce others to do so, are derived from the common law; it is only in so far as something in the Act forbids their exercise that their exercise becomes unlawful." In that case a minority union was recognized as having standing in a grievance proceeding outside the collective bargaining agreement, even where a majority had chosen another union. See *American Foundries* v. *Tri-City Council*, 257 U. S. 184.

Honoring a minority union—where no majority union exists or even where the activities of the minority union do not collide with a bargaining agreement—is being respectful of history. Long before the Wagner Act, employers and employees had the right to discuss their problems. In the early days the unions were representatives of a minority of workers.[2] The aim—at least the hope—

---

[2] Twentieth Century Fund, How Collective Bargaining Works (1942), p. 24; U. S. Dept. of Labor Information Bulletin, Vol. 5, No. 6 (1938), pp. 5–8. For examples of such "members only" contracts, see, *e. g.*, 2 L. R. R. Man. 964, 967. See also Union Recognition as Shown in Contracts, 14 L. R. R. Man. 781–787: "The beginning point of collective bargaining in labor relations is the recognition by an employer of the other party to any contract entered into as the party representing employees . . . . [U]nion-recognition clauses, as embodied in most recent contracts generally fall into two different patterns. In some contracts, the union is recognized as the exclusive

of the legislation was that majority unions would emerge and provide stabilizing influences. Yet I have found nothing in the history of the successive measures, starting with the Wagner Act, that indicates any purpose on the part of Congress to deny a minority union the right to bargain for its members when a majority have not in fact chosen a bargaining representative.[3]

I think the Court is correct insofar as it sets aside the exclusive recognition clause in the contract. I think it is incorrect in setting aside the entire contract. *First*, that agreement secured valuable benefits for the union's members regarding wages and hours, work standards and distribution, discharge and discipline, holidays, vacations, health and welfare fund, and other matters. Since there was no duly selected representative for all the employees authorized in accordance with the Act, it certainly was the right of the employee union members to designate the union or any other appropriate person to make this contract they desired. To hold the contract void as to the union's voluntary members seems to me to go beyond the competency of the Board under the Act and to be unsupported by any principle of contract law. Certainly there is no principle of justice or fairness with which I am familiar that requires these employees to be stripped of the benefits they acquired by the good-faith bargaining of their designated agent. Such a deprivation gives no protection to the majority who were not members of the

---

bargaining agent for all employees. In others, the union is recognized as bargaining agent for those employees only who are or may become members of the union."

[3] The Board has frequently recognized that recognition of a minority union as representative of its members only was not an unfair labor practice, absent the choice by a majority of a different bargaining representative. See *Solvay Process Co.*, 5 N. L. R. B. 330, 340; *Hoover Co.*, 90 N. L. R. B. 1614, 1618. And see *Cleveland Worsted Mills Co.*, 43 N. L. R. B. 545; *Black Diamond S. S. Corp.* v. *Labor Board*, 94 F. 2d 875.

union and arbitrarily takes from the union members their contract rights.

Second, the result of today's decision is to enjoin the employer from dealing with the union as the representative of its own members in any manner, whether in relation to grievances or otherwise, until it is certified as a majority union. A case for complete disestablishment of the union cannot be sustained under our decisions. While the power of the Board is broad, it is "not limitless." *Labor Board* v. *Mine Workers*, 355 U. S. 453, 458. Thus a distinction has been taken between remedies in situations where a union has been dominated by the employer and where unions have been assisted but not dominated. *Id.*, 458–459.

The present case is unique. The findings are that both the employer and the union were in "good faith" in believing that the union represented a majority of the workers. Good-faith violations of the Act are nonetheless violations; and the present violation warrants disestablishment of the union as a majority representative. But this good-faith mistake hardly warrants full and complete disestablishment, heretofore reserved for flagrant violations of the Act. Its application here smacks more of a penalty than of a remedial measure.

I think this union is entitled to speak for its members until another union is certified as occupying the bargaining field. That is its common-law right in no way diluted or impaired by the Act.